Supreme Court, U.S.
FILED

96 36 JUL 8 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

ROBERT DALE HARRISON,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES L. MURPHY III
STEPHEN NUNN*
JOHN L. KENNEDY
Metropolitan Department of Law
Attorneys for Petitioner

204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/862-6341

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit construed a consent decree in a federal civil rights case in a way which conflicts with applicable decisions of the United States Supreme Court by effectively modifying the terms of the decree, and holding defendant municipal corporation in contempt thereof.

LIST OF PARTIES

The parties in this cause are Mr. Robert Dale Harrison, plaintiff; and defendant The Metropolitan Government of Nashville and Davidson County, Tennessee. Also named as parties defendant are the Board of Health of the Metropolitan Government of Nashville and Davidson County, Tennessee, and certain former members of the Board in their official capacities. However, relief was entered only against the defendant Metropolitan Government.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Authorities Involved	1
Statement of the Case	3
Reasons for Granting the Petition for Writ of Certiorari	10
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

CASES CITED:

Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973) ... 12

City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978) ... 11

Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991) ... 10

Harrison v. Metropolitan Government, 80 F.3d 1107 (6th Cir. 1996) ... *passim*

International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) ... 11, 12

River Vale Township v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968) ... 12

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) ... 10

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .. 11, 12

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) ... 11

United States v. Armour & Co., 402 U.S. 673 (1971) .. 11, 13

STATUTES CITED

12 U.S.C. § 1254(1) ... 1

28 U.S.C. § 1331 ... 3

28 U.S.C. § 1342 ... 3

42 U.S.C. § 1981 ... 3

42 U.S.C. § 1982 ... 3

TABLE OF CITED AUTHORITIES – Continued

Page

42 U.S.C. § 1983 3

42 U.S.C. § 1986 3

42 U.S.C. § 1988 3

42 U.S.C. § 2000d, Title VII of the Civil Rights Act of 1964 3

42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964 ..... 3, 8

OPINIONS BELOW

The petitioner urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in the above-captioned cause. The opinion is reported. *Harrison v. Metropolitan Government,* 80 F.3d 1107 (6th Cir. 1996). The opinion was filed April 8, 1996. The slip opinion is set forth at pages 1a through 27a of the appendix to this petition. The United States District Court for the Middle District of Tennessee entered its memorandum and order in this matter on June 10, 1994. The district court entered a memorandum and order on the Metropolitan Government's motion for stay of judgment on September 1, 1994. Neither district court opinion is reported at this time. The principal district court opinion is set forth at pages 37a through 67a of the appendix to this petition. The memorandum and order on the motion for stay are at pages 28a through 36a of the appendix to this petition.

STATEMENT OF JURISDICTION

The appellate court judgment was filed on April 8, 1996. The jurisdiction of this court is pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The due process clause of the Fifth Amendment to the United States Constitution reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 10 of the Rules of this Court reads as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual courts of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> > (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state

court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

STATEMENT OF THE CASE

Robert Dale Harrison was first employed by the respondent Metropolitan Government in the Rabies Control Division of the Metropolitan Health Department on June 2, 1972. Mr. Harrison filed this lawsuit on June 18, 1980, under 42 U.S.C. §§ 1981, 1982, 1983, 1986 and 1988; and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000e. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1342. At that time, he was employed in the position of Rabies Control Officer I. Mr. Harrison, who is black, alleged that he was denied promotional opportunity due to his race, and that he was a victim of retaliation for filing a complaint with the EEOC in November 1973, the retaliation being that he was denied light-duty work and rehabilitation after suffering an on-the-job injury in 1976.

On May 17, 1982, the United States District Court for the Middle District of Tennessee entered a Consent Decree. The Consent Decree stated that the parties had agreed that the case could be dismissed upon satisfaction of certain requirements by Metropolitan Government as set forth below:

> 1. The defendant Board of Health of the Metropolitan Government of Nashville and Davidson County shall rehire the plaintiff at the position of Rabies Control Officer II in the Rabies Control Division of the Metropolitan Department of Health at a minimum salary of $1,057.00 per month, plus any pay increments or raises to which he may be entitled. The rehire shall be effective June 1, 1982.
>
> 2. The plaintiff shall receive any on-the-job training necessary to perform efficiently in the position and for promotion to the position of Rabies Control Officer III upon such position becoming available and plaintiff meeting the qualifications therefor.
>
> 3. Job seniority will be calculated as if the plaintiff had been on the job with no break in service.
>
> 4. The plaintiff will receive back pay in the amount of $15,000.00 with necessary deductions for Federal Income Tax and FICA contribution.
>
> 5. Annual leave and sick days will be calculated as if there had been no break in plaintiff's employment at the Metropolitan Health Department and will be a minimum of 18 days of annual leave and sick days.
>
> 6. Attorney's fees of $5,000.00 will be paid to plaintiff's attorney over and above the back pay

above ordered, the attorney's fee having been determined to be a reasonable fee for services.

7. The defendants shall not discriminate against plaintiff or other black persons on account of race, or on account of his complaints against racial discrimination or this lawsuit.

8. The parties to this action are hereby mutually released of any further liability to each other, or their privies, arising out of this action; and any and all charges against the defendants either individually or in their professional capacities are dismissed upon defendant's compliance with this Order of Judgment.

9. The defendant, the Metropolitan Government, shall pay all costs resulting from this action.

Harrison v. Metropolitan Government, Order of Judgment, May 17, 1982, Appendix at 68a [hereinafter cited as Consent Decree].

Pursuant to the Consent Decree entered on May 17, 1982, Mr. Harrison was reinstated to employment in the Rabies Control Division of the Metropolitan Health Department on June 1, 1982 as a Rabies Control Officer II, in a position created specifically for him pursuant to the agreed order. Back pay of $15,000.00 and attorney's fees of $5,000.00 were also paid. Mr. Harrison received full seniority benefits, such as longevity pay, annual leave, sick leave, and credit for continuous employment for pension purposes, as if there had been no break in employment.

As of the date of entry of the Consent Decree, Robert Gibbs, Ronnie Cartwright and Kenneth Chambers were

employed in the higher classification of Rabies Control Officer III. Mr. Gibbs and Mr. Cartwright are black; Mr. Chambers is white. Mr. Gibbs had longer employment than Mr. Harrison at the Rabies Control Division of the Metropolitan Health Department. Mr. Cartwright and Mr. Chambers did not; however, they were in their Rabies Control Officer III positions before the Consent Decree was entered.

Mr. Harrison filed applications for promotion to Rabies Control Officer III on July 25, 1984, and August 20, 1988; however, there were no open positions for Rabies Control Officer III. On September 19, 1988, he filed an application for the position of Rabies Control Manager. Messrs. Gibbs, Cartwright, Chambers, and Mr. Bill Hendrickson also applied for that position. Ultimately, Mr. Larry Cole, who was employed in the Pollution Control Division of the Health Department was chosen for the position of Rabies Control Manager. Mr. Cole is black.

In October 1988, Mr. Cole and the Metropolitan Health Department implemented a new policy that disciplinary problems of employees in the Rabies Control Division would not be held against them; in other words, all would have a clean slate. Also, after October 1988, the Metropolitan Health Department instituted a progressive discipline policy for employees of the Rabies Control Division who had had accidents while driving Metro motor vehicles in which the employee appeared to be at fault. For the first such act, there would be an oral reprimand; for the second, a written reprimand; for the third, suspension; and the fourth could result in dismissal. The policy was communicated to the employees there. After October of 1988, Mr. Harrison had four (4) accidents

while driving a Metro motor vehicle. In two accidents, he struck other vehicles in the rear; in one he backed into another vehicle; and in another he collided with a police car at an intersection. Traffic tickets issued to Mr. Harrison after two of the accidents were dismissed, and he testified that the prosecuting police officer was not present for one of the court dates.

Mr. Harrison received a suspension of three (3) days after his third accident which occurred in July of 1991. He was also suspended at the same time for another three (3) days on the stated grounds of encouraging a junior Rabies Control Officer to leave his territory and help him trap cats running at large, at the request of a relative of Mr. Harrison. Mr. Harrison filed a claim with the EEOC arising out of these suspensions. The EEOC found the claim to be without merit.

In October of 1989, the classifications of Rabies Control Officer II and III were abolished, and in their place the position of Senior Rabies Control Officer was created. Mr. Harrison and Mr. Billy Hendrickson, who is white, occupied the position of Rabies Control Officer II at that time; they were both transitioned to Senior Rabies Control Officer at a lower step than the three (3) men in the Officer III positions – Mr. Gibbs, Mr. Cartwright and Mr. Chambers.

Mr. Harrison's employment was terminated effective November 3, 1992, after his fourth at-fault accident. Other grounds cited in the termination were paperwork errors and rudeness. Mr. Harrison appealed his dismissal to the Metropolitan Board of Health. The Board ruled that the

charge of rudeness was not supported by a preponderance of the evidence, but that the careless driving and paperwork errors were grounds for dismissal. Mr. Harrison filed a claim with the EEOC arising out of his dismissal. The EEOC found no cause and dismissed the claim.

Mr. Harrison filed two prior EEOC claims since 1982. Each of these claims involved disciplinary action for falsification of doctors' appointment slips, and the EEOC found no cause in either case.

On December 30, 1993, Mr. Harrison filed two lawsuits. In Case No. 80-3271, he filed a petition for contempt, alleging that the Metropolitan Government did not comply with all the provisions of the Consent Decree, and that his employment had been terminated on account of his race and in retaliation for filing complaints with the EEOC. Mr. Harrison also filed Case No. 3:93-1075, a complaint arising out of the same facts and alleging unlawful race discrimination and damages under 42 U.S.C. §§ 2000(e), *et seq*. The complaint in Case No. 3:93-1075 also alleged causes of action arising under Tennessee common law; breach of contract; and intentional or negligent infliction of emotional distress. The Metropolitan Government filed answers to both actions on January 24, 1994. A jury trial was requested by both parties in Case No. 3:93-1075.

Mr. Harrison moved to reopen Case No. 80-3271 on January 3, 1994. By Order entered on January 31, 1994, the Court granted the Motion to Reopen and set oral argument on the Petition for Contempt for February 24,

1994. By agreement, hearing on the Petition for Contempt was continued to March 28, 1994.

The case on Mr. Harrison's Petition for Contempt was heard, with extensive testimony, over four (4) days – March 28, March 31, April 5 and April 8, 1994. By Memorandum and separate Order entered on June 14, 1994, the District court found the Metropolitan Government in contempt of the Consent Decree of May 17, 1982. Specifically, the District Court found the Metropolitan Government to be in contempt of the Consent Decree with respect to its action vis-a-vis Mr. Harrison in the areas of training; promotion; seniority; discrimination; harassment and retaliation. No findings were entered against the individual defendants.

The Order consolidated Case No. 3:93-1075 with Case No. 80-327. By Order entered on June 29, 1994, the District Court awarded Mr. Harrison lost earnings of $33,109.97 and attorney's fees of $44,754.36.

The Metropolitan Government filed its Notice of Appeal on July 14, 1994. In an opinion filed April 8, 1996, the Sixth Circuit Court of Appeals upheld the District Court findings of contempt with respect to the Metropolitan Government in the areas of training, promotion, discrimination, and retaliation. It reversed on the issues of seniority and harassment. Judge Kennedy filed a separate opinion, concurring in part and dissenting in part.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Both the appellate and district courts rewrote, and vitiated, the 1982 Consent Decree in the guise of interpreting it. In so doing, they acted inconsistently with the jurisprudence of this Court and prejudiced the rights of this defendant.

The Metropolitan Government does not here address the question whether the 1982 Consent Decree should be modified. Such modification might be in order given the length of time that has passed since 1982 and certain changed circumstances, such as the restructuring of the Rabies Control Officer III classification into that of Senior Rabies Control Officer. But established procedure and criteria exist for reviewing consent decrees and modifying them in light of changed circumstances. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The effect of the rulings below was to modify the 1982 decree and then find the Metropolitan Government *in contempt of the order as modified* – a violation of the Metropolitan Government's rights under the order.

As the district court stated, the test for a finding of civil contempt is whether it has been shown by clear and convincing evidence that the defendant failed to take "all reasonable steps within [its] power to comply" with the order. *Glover v. Johnson*, 934 F.2d 703 at 708 (6th Cir. 1991). The Metropolitan Government respectfully submits that no such showing was made by clear and convincing evidence in this case and that the finding of contempt necessarily depends on the unacknowledged modification of the terms of the Consent Decree.

The terms of consent decrees are arrived at through the parties' material agreement and are contractual documents, as well as judicial decrees. *International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). They are hybrids, having characteristics of judicial decrees and contracts. *Id.* at 519. Although subject to continued judicial policing, they should be construed basically as contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). It is crucial to bear in mind that, in a consent decree, the defendant has given up all chance to prevail on the merits in exchange for the limits placed on affirmative relief. As this Court has said:

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected and the instrument must be construed as it is written, and not as it might have been written had plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673 at 682 (1971). The due process rights of the Metropolitan Government have been compromised here because the limitations placed by the Consent Decree upon the scope of relief available to Mr. Harrison have not been respected, and the instrument has not been construed as written.

It may be that this defendant, as a political subdivision of a state, cannot fully avail itself of the protections of the due process clause. *See*, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). *But see City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), (assuming without

deciding city to be a person for purposes of due process clause); *Aguayo v. Richardson*, 473 F.2d 1090 (2nd Cir. 1973), (question whether city is a person under due process clause for some purposes not necessarily "foreclosed" by *Katzenbach*); *River Vale Township v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968), (holding city can invoke due process clause in proceeding against a state other than the state which created it).

In any event, the Metropolitan Government has rights under the Consent created by the jurisprudence of this Court. These rights may be conceptualized as based, in addition to due process, on contract rights and on the federal common law applicable to consent decrees created by the decisions of this Court. The failure of the trial and appellate courts to respect these rights "so far [departs] from the accepted and usual course of judicial proceedings, or [sanctions] such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). To allow this decision to stand as a precedent will almost certainly lead to further misinterpretation of consent decrees in the future, causing them to become unreliable and disfavored as mechanisms of resolving litigation. And the consent decree is an especially important and valued instrument for resolution of Title VII litigation. *See International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 at 517-524 (1986).

The Sixth Circuit found the District Court's rulings that the Metropolitan Government violated the 1982 Consent Decree to be supported by clear and convincing evidence on four out of six points: training; promotion; discrimination; and retaliation for the plaintiff's filing

EEOC actions. It affirmed the District Court on these points. It found clear error on the remaining two, seniority and harassment, and reversed as to those. Judge Kennedy, in a separate opinion, dissented from the majority on promotion and discrimination. The following matrix is thus produced:

	Majority		Dissent
1.	Training	No clear error – affirmed	Concur
2.	Promotion	No clear error – affirmed	Dissent
3.	Seniority	Clear error – reversed	Concur
4.	Discrimination	No clear error – affirmed	Dissent
5.	Harassment	Clear error – reversed	Concur
6.	Retaliation	No clear error – affirmed	Concur

Thus, the Court of Appeals unanimously reversed the District Court's findings that the Metropolitan Government violated the Consent Decree as to seniority rights and plaintiff's harassment. From this reversal, the Metropolitan Government does not of course appeal. This leaves the issues of promotion; discrimination; training; and retaliation.

1. Promotion

On the question of promotion, the majority initially appears to accept the Metropolitan Government's argument that the 1982 Consent Decree should be interpreted "within its four corners", citing *United States v. Armour & Co.*, 402 U.S. 673 at 682 (1971). The majority concludes the Metropolitan Government circumvented the 1982 Consent Decree in promoting certain employees to Rabies Control Officer III prior to the Order's entry. The majority seems to reason that the positions were filled with others

so as to make them unavailable to Mr. Harrison. As the dissent notes, there is absolutely no evidence, or even any claim by plaintiff, that he was unaware of these promotions when the Consent Decree was entered. These promotions were part of what the Metropolitan Government bargained for when the decree was entered. To use the promotions now as a predicate for a finding of contempt violates the Metropolitan Government's rights under the order. As the dissent succinctly states, "[t]here is no legal or factual basis to find that Metro violated the consent judgment by these . . . promotions." *Harrison v. Metropolitan Government*, 80 F.3d 1107 at 1120 (6th Cir. 1996); Appendix at 26a. Further, the majority goes beyond the four corners of the Consent Decree to the extent that it seems to hold that the decree required the creation "at will" of promotional opportunities for Mr. Harrison. *Id.* at 1114, Appendix at 11a. The decree simply does not require, per se, the promotion of Mr. Harrison to Rabies Control Officer III unless a vacancy occurs in the normal course of events.

The Consent Decree reads:

> 2. The plaintiff shall receive any on-the-job training necessary to perform efficiently in the position [of Rabies Control Officer II] and for promotion to the position of Rabies Control Officer III *upon such position becoming available* and plaintiff meeting the qualifications therefor. (Emphasis supplied).

Appendix at 68a-69a. The majority states that "the record suggests that the defendants could create positions at will, because Mr. Harrison's position as a Rabies Control

Officer II was created especially for his 1982 reinstatement, and because Metro eliminated the title distinctions between level II and level III officers altogether in 1989." 80 F.3d at 1114, Appendix at 11a. But the Consent Decree unambiguously did not require creation of a position especially for Mr. Harrison's promotion; and, as stated, no promotions for a level III position – or to a higher step in the Senior Rabies Control Officer classification – became available during the relevant time frame. And of course, the Decree in no way addresses promotion to manager of the facility.

2. Discrimination

The majority's conclusions as to discrimination are based on findings of unequal treatment of plaintiff and similarly situated employees regarding traffic accidents and paperwork errors. The majority upheld the District Court in its finding that these reasons relied upon by Metro for terminating the plaintiff were pretextual. The dissent points out that the other employees disciplined for traffic infractions were not similarly situated to the plaintiff because their infractions occurred prior to the 1988 clean-slate policy. The Consent Decree did not prohibit Metro from adopting a clean-slate policy.

3. Training

On training, the Consent Decree provides:

> 2. The plaintiff shall receive any on-the-job training *necessary* to perform efficiently in the position [of Rabies Control Officer II] and for promotion to the position of Rabies Control

> Officer III upon such position becoming available and plaintiff meeting the qualifications therefor. (Emphasis supplied).

Appendix at 68a-69a. The Sixth Circuit says:

> The district court found that the defendants had failed to exercise reasonable diligence in complying with the 1982 consent decree because despite the order's training directive, 'Mr. Harrison was . . . excluded from opportunities to improve his skills and gain training credentials.' On appeal, Metro asserts that the training provision of the 1982 Judgment should be construed to require only that it provide the plaintiff with 'whatever on-the-job training was normally provided to Rabies Control Officers II and Rabies Control Officers III . . . . ' No proof, it says, was ever presented to suggest that any formal training was 'necessary' for the positions of Rabies Control Officer II or for promotion to level III.
>
> *We do not disagree with Metro's construction of the training requirement.* (Emphasis supplied).

80 F.3d at 1113, Appendix at 8a-9a.

Nevertheless, the Court goes on to affirm. But, in acknowledging that Metro's construction of the training requirement is correct, the Court has acknowledged that Metro is not in contempt unless it failed to provide training *necessary* for the plaintiff's job or for promotion. And the Court makes no such finding. Therefore, it goes beyond the limits of the Consent Decree.

4. Retaliation

The Sixth Circuit's finding of retaliation by the Metropolitan Government depends upon, and is derivative of, its previous finding that the Metropolitan Government's reasons for terminating Mr. Harrison's employment were pretextual. 80 F.3d at 1119, Appendix at 23a. To repeat, those reasons were an excessive number of at-fault traffic accidents, under the October 1988 policy; and excessive paperwork errors. The Metropolitan Government respectfully submits that the dissent's view on the implementation of the traffic accident policy states the better reasoned position and that the other individuals – "blundering employees" though they may have been to use the majority's phrase – were not similarly situated to the plaintiff. The valid finding with regard to his at-fault traffic record is sufficient to support his termination, under the correct view espoused by the dissent.

CONCLUSION

The Court of Appeals unanimously reversed the District Court's findings of contempt with regard to the issues of seniority and harassment. On the issue of failure to promote, the majority simply ignores the fact that the promotions in place prior to the entry of the Consent Decree were part of the Metropolitan Government's bargained for position under that decree, and their validity must therefore be respected. Nor does the decree in anyway mandate promotion unless vacancies arise in a Level III position or its equivalent. No such promotional opportunities arose after entry of the Consent Decree, except

that to manager of the facility, which is not addressed by the decree. On the training issue, the majority simply ignores the fact that all the Consent Decree requires is necessary training for promotion to a Level III. And the majority's finding of retaliation fails because of the flaws inherent in its findings of discrimination in application of the clean-slate traffic accident policy, which was the basis for Mr. Harrison's termination.

What the District Court did, and what the Sixth Circuit has sanctioned on appeal, was effectively rewrite the Consent Decree without notice to the Metropolitan Government, and then enter a finding of contempt of the decree as re-written. This action violates the case law of this Court concerning consent decrees. Even if Mr. Harrison is entitled to relief in some form, that relief is not holding the Metropolitan Government in contempt but a hearing on whether the Consent Decree should be modified. At a minimum, therefore, this holding should be reversed and the case should be remanded for a hearing on whether the circumstances since the entry of the 1982 Consent Decree have sufficiently changed to warrant its modification.

Respectfully submitted,

JAMES L. MURPHY III
STEPHEN NUNN*
JOHN L. KENNEDY
Metropolitan Department of Law
Attorneys for Petitioner

204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/862-6341

*Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION:
1996 FED App. 0113P (6th Cir.)
File Name: 96a0113p.06

No. 94-6042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT DALE HARRISON, Plaintiff-Appellee, *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant-Appellant, BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendants.	)	ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed April 8, 1996

Before: LIVELY, KENNEDY, and RYAN, Circuit Judges.

LIVELY, J., delivered the opinion of the court, in which RYAN, J., joined. KENNEDY, J. (pp. 21-23), delivered a separate opinion concurring in part and dissenting in part.

LIVELY, Circuit Judge. The defendant, Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), appeals from a judgment of the district court entered on June 14, 1994, finding it in contempt of a 1982 consent decree terminating litigation between the plaintiff, former Metro employee Robert Dale Harrison, and Metro. The district court, which had retained jurisdiction over the case after entering the consent decree, granted Mr. Harrison's motion to reopen the case upon his filing a petition for an adjudication of civil contempt. Following a four-day hearing, the district court found Metro in contempt and ordered it to perform specific affirmative acts in addition to paying the plaintiff for lost earnings. The court also directed Metro to pay all costs and the plaintiff's attorney fees. Upon Metro's posting a supersedeas bond, the district court stayed the money judgment, but refused to stay the injunctive provisions of its decree.

I.

A.

The plaintiff, who is black, was hired by Metro in 1972 to work in the Rabies Control Division of the Metropolitan Health Department (the Health Department). The Rabies Control Division is located in the Animal Control Facility (the pound). Mr. Harrison filed an employment discrimination action in district court on June 12, 1980, against Metro, the Board of the Health Department (the

Board) and Board members. The plaintiff alleged that the defendants had denied him promotional opportunities on account of his race, and that they had retaliated against him for filing a complaint with the Equal Employment Opportunity Commission (EEOC). At the time of the lawsuit, Mr. Harrison was employed as a Rabies Control Officer I.

Pursuant to an agreement among the parties, the district court entered an Order of Judgment on May 17, 1982 (1982 Judgment or the consent decree), which directed the defendants to reinstate Mr. Harrison at the Rabies Control Officer II level; to calculate his annual leave and sick days as if there had been no break in his employment; and to pay Mr. Harrison $15,000 in back pay and $5,000 in attorney fees, plus costs. The consent decree also contained the following affirmative provisions:

> 2. The plaintiff shall receive any on-the-job training necessary to perform efficiently in the position [of Rabies Control Officer II] and for promotion to the position of Rabies Control Officer III upon such position becoming available and plaintiff meeting the qualifications therefor.
>
> 3. Job seniority will be calculated as if the plaintiff had been on the job with no break in service.
>
> * * *
>
> 7. The defendants shall not discriminate against plaintiff or other black persons on account of race, or on account of his complaints against racial discrimination or this lawsuit.

Metro paid Mr. Harrison $20,000 and reinstated him on June 1, 1982, as a Rabies Control Officer II. He was then reclassified in 1989 as a Senior Rabies Control Officer, as were all other employees who formerly held Rabies Control Officer II or III positions.

B.

Under the applicable civil service rules, the pound was required to enforce a progressive disciplinary policy which provided that an employee would receive a written reprimand for a first infraction of work rules, suspension for a second infraction, demotion for a third infraction and termination for a fourth infraction. With respect to driving accidents, the policy at the pound was to give an oral reprimand for an employee's first accident, a written reprimand for the second, suspension without pay for the third, and to terminate the employee after the fourth. During the plaintiff's employment, and after his reinstatement, a new pound manager, Larry Cole, implemented a policy by which all driving accidents that occurred prior to October 1988 would be "wiped clean" from the employees' records.

In 1989, the plaintiff received an oral reprimand after hitting the rear of another car in a driving accident. He received a written reprimand for colliding into a police car at an intersection in July 1991. In August 1991, Mr. Harrison was suspended for six days without pay after he allegedly encouraged Jeffrey Baker, another rabies control officer, to leave his assigned territory to help him capture stray cats. The defendants claimed that leaving one's territory as well as picking up cats was against pound

policy. Mr. Harrison appealed his suspension to the Board under the civil service grievance procedure in May 1992, but apparently to no avail.

The plaintiff had two more driving accidents, one in September 1991 and one in the fall of 1992, the latter of which he allegedly failed to report to his supervisor according to pound practice. At around the same time, Mr. Harrison was involved in two incidents in which he was allegedly rude to customers. Further, on July 30, 1992, the plaintiff received a written reprimand for excessive errors in paperwork.

On July 31, 1992, Paul Botranger, the Director of the Bureau of Environmental Health Services, issued a memorandum to all rabies control personnel regarding errors commonly made on receipts. The defendants had discovered these errors after reviewing all paperwork completed by pound employees between October 29, 1991, and July 27, 1992. On September 28, 1992, Mr. Botranger wrote a memorandum to Dr. Fredia Wadley, the director of the Health Department, indicating that Mr. Harrison continued to make the mistakes pointed out in his July 31 memorandum. Although a number of employees continued to forget to write in the number of days an animal had been impounded, the plaintiff was allegedly the only employee who consistently failed to follow proper procedure in correcting errors on receipts. Mr. Botranger therefore recommended that Mr. Harrison be terminated.

On November 2, 1992, Dr. Wadley informed Mr. Harrison in writing that he was terminated. Initially, the plaintiff was terminated on the grounds that he had been involved in four vehicular accidents, had failed to report

his fourth accident to his supervisor, had made excessive paperwork errors and had been rude to the public. However, after Mr. Harrison appealed his dismissal to the Board in February 1993, the Board upheld his dismissal only on the grounds of careless driving and paperwork errors.

Mr. Harrison filed four separate charges with the EEOC after his 1982 reinstatement alleging discrimination and/or retaliation in his employment at the Health Department. In 1992, he also complained either orally or in writing to his supervisor, the director of the Health Department and the mayor of Nashville about how he felt he had been harassed at the pound.

C.

On December 30, 1993, the plaintiff filed the petition of contempt alleging that Metro, the Board and Board members failed to comply with the 1982 Judgment and ultimately terminated him on account of his race and in retaliation for filing a complaint with the EEOC. On the same day, Mr. Harrison filed a separate federal complaint arising out of the same facts and alleging unlawful race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. Sec. 2000e *et seq.*, and Tennessee law. The district court consolidated the two cases. After an evidentiary hearing, the court found that the defendants had paid Mr. Harrison $20,000 and rehired him as a Rabies Control Officer II, but were in contempt because they had "failed to take all reasonable steps to comply" with the order's directives in the areas of training, promotion, seniority and anti-

discrimination. Accordingly, the court included affirmative directives in its 1994 judgment similar to those in the 1982 consent decree.

On appeal Metro argues that the district court's findings that the defendants violated the 1982 consent decree by failing to train, failing to promote, failing to grant seniority and pay at the required level, and harassing and discriminating against the plaintiff in disciplining and terminating him are all clearly erroneous. Metro also contends that the district court, in the guise of interpreting the 1982 consent decree, actually rewrote it.

II.

A.

In order to hold the defendants in civil contempt, a district court must find that the plaintiff established by clear and convincing evidence that the defendants violated the court's prior order. *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991) (citing *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). In fact, each finding of a violation of the order must be supported by clear and convincing evidence. See *id.* at 710-13. The test for determining a violation is whether the defendants failed to take "all reasonable steps within their power to comply with the court's order." *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989). We review the district court's finding of civil contempt for an abuse of discretion. *Id.* at 968. A district court may abuse its discretion when it relies on clearly erroneous findings of fact. *Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993) (citation omitted). In examining findings of

fact, this court may reverse only if after a review of all the evidence, we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985) (quotation marks and citation omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. We review the district court's interpretation of the consent decree de novo. *Stotts v. Memphis Fire Dep't*, 858 F.2d 289, 299 (6th Cir. 1988) (citation omitted).

B.

With these principles in mind, we now consider each claim of a clearly erroneous finding separately.

1. Training

The district court found that the defendants had failed to exercise reasonable diligence in complying with the 1982 consent decree because despite the order's training directive, "Mr. Harrison was . . . excluded from opportunities to improve his skills and gain training credentials." On appeal, Metro asserts that the training provision of the 1982 Judgment should be construed to require only that it provide the plaintiff with "whatever on-the-job training was normally provided to Rabies Control Officers II and Rabies Control Officers III. . . . " No proof, it says, was ever presented to suggest that any formal training was "necessary" for the positions of Rabies Control Officer II or for promotion to level III.

We do not disagree with Metro's construction of the training requirement. Nevertheless, the district court explicitly found training was indeed offered to other rabies control officers, whether "necessary" or not, while Mr. Harrison was not afforded any such opportunities. Specifically, witnesses testified that at least three white rabies control officers – Victoria Maxwell, Billy Hendrixson and Kenneth Chambers – attended a four- or five-day training session on supervisory skills as well as another training session on animal control. Although the testimony is conflicting, there is also sufficient evidence to show that Mr. Harrison was not offered *any* training after his reinstatement except for euthanasia training from which he was excused and perhaps some private counseling regarding his paperwork mistakes. In fact, the evidence suggests that he and three other black employees were never even apprised of such training opportunities, and that they only heard about such training after-the-fact when employees who had attended discussed the matter. Thus, the district court's finding of a violation of the training provision is not clearly erroneous.

2. Promotion

Next, the district court found that the defendants failed to promote Mr. Harrison "as directed." Metro contends that the plain language of the 1982 Judgment requires only that the plaintiff be considered for a promotion if and when a Rabies Control Officer III position became available. Metro points out that those employees who were promoted to the position of Rabies Control Officer III were promoted before the 1982 Judgment was in effect. According to Metro, between the date of entry

of the consent decree until the level II and III positions were combined in 1989 into the new position of Senior Rabies Control Officer, there were no vacancies in the position of Rabies Control Officer III. Citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (consent decree must be construed by its express terms since the defendant waived his due process right to litigate the issues in exchange for the decree), Metro argues that the district court's construction of the 1982 Judgment required automatic promotion of Mr. Harrison and therefore erroneously went beyond the four corners of the consent decree. See also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984).

Armour admonishes courts to interpret the scope of a consent decree "within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Armour*, 402 U.S. at 682. However, even if we accept Metro's interpretation of the 1982 Judgment, the district court's finding in the area of promotions was not clearly erroneous. In its September 1994 memorandum addressing Metro's motion for stay of judgment, the district court explained that it had "specifically rejected Defendant's argument that Defendant failed to promote Plaintiff as ordered because no promotions to Rabies Control Officer III were available after Plaintiff was reinstated." The court then noted that "it was Defendant's unlawful conduct that resulted in Plaintiff being terminated, and Defendant should not be rewarded for taking actions during Plaintiff's illegal termination which then made it 'impossible' for Defendant to comply with the Court's Order."

We understand the district court to be referring to its belief that the Rabies Control Officer III positions were "filled" by the defendants prior to Mr. Harrison's reinstatement in order to circumvent the promotion provision of the 1982 Judgment. The court's inference can be supported by the record. The record contains evidence of bad faith in that it indicates the defendants denied Mr. Harrison's request for reinstatement as a Rabies Control Officer III in 1982 on the ground that no level III position was available. Yet in that same year, three employees were promoted to the position of Rabies Control Officer III, and two of the three employees who were promoted had less seniority than the plaintiff. Mr. Harrison then formally applied for the position of Rabies Control Officer III in 1984 and 1988, but again was denied, at least once because Metro had not yet "posted a [position for] R.C. Officer III." As the district court found, however, promotional opportunities were disseminated only by word of mouth and were never publicly posted or made known to the plaintiff, despite civil service rules that required such opportunities to be announced and advertised in a manner such that all eligible employees could apply. Finally, the record suggests that the defendants could create positions at will, because Mr. Harrison's position as a Rabies Control Officer II was created especially for his 1982 reinstatement, and because Metro eliminated the title distinctions between level II and level III officers altogether in 1989. This evidence convinces us that the district court's view that the defendants did not exert the requisite diligence in complying with its order was not clearly erroneous. See *Glover*, 934 F.2d at 708 (citing *Fortin v. Commissioner of Massachusetts Dep't of Pub. Welfare*, 692

F.2d 790, 796-97 (1st Cir. 1982), for the proposition that the defendants have the burden of proving impossibility of compliance).

3. Seniority

The third directive of the 1982 Judgment states: "Job seniority will be calculated as if the plaintiff had been on the job with no break in service." Metro maintains that the district court abused its discretion because its finding that the defendants violated this provision was not supported by clear and convincing evidence. The district court found that "Mr. Harrison was paid less than all other Senior Officers and was the only Senior Officer to be denied supervisory responsibilities."

Here we agree with Metro. Although the plaintiff was the second most senior employee at the pound and received less pay than the other Senior Rabies Control Officers, the plaintiff presented no evidence that an employee at the pound would necessarily receive higher pay than all employees junior to him. The evidence showed that while longevity pay was based on years of service, step increases in salary were based only on merit. Mr. Harrison did in fact receive the second highest longevity pay of all the pound employees. Although the failure of the plaintiff to start at the same pay step or to progress up the pay scale at the same rate as his colleagues might be evidence of discrimination or retaliation, it does not support a finding that the defendants violated the order with respect to restoring Mr. Harrison's full seniority.

In addition, even though the record demonstrates that Mr. Harrison was denied the supervisory responsibilities given to all other Senior Rabies Control Officers, there is no proof that supervisory duties were a necessary incident to seniority. Since the consent decree at issue does not expressly state that supervisory duties must be given to the plaintiff, we decline to read such a requirement into the decree. See *Stotts*, 467 U.S. at 574-75. The district court's finding that the defendants violated the consent decree by failing to "calculate" Mr. Harrison's seniority as directed was therefore clearly erroneous.

4. Discrimination

The district court found clear and convincing evidence that the defendants had violated the anti-discrimination provision of the 1982 Judgment on two grounds. First, the court held that Mr. Harrison's supervisor, Mr. Cole, had unlawfully harassed or retaliated against Mr. Harrison and had been "unresponsive to Mr. Harrison's complaints about harassment." Second, the court held that the reasons articulated for firing the plaintiff were pretext for discrimination, pointing to its finding that Mr. Harrison was punished more severely than other employees for his infractions. In this regard, the district court also questioned the legitimacy of Metro's audit for paperwork errors.

Mr. Harrison presented a disparate treatment claim in which there was no direct evidence of discrimination. Thus, we apply the familiar three-part analysis: (1) the

plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Metro argues that the district court erred because it failed to explicitly employ the *McDonnell Douglas/Burdine* framework of proof in its analysis of the facts at bar. However, even though the district court did not use "magic words," we are satisfied that the court's finding of discriminatory discipline in violation of the consent decree was not clearly erroneous.

A plaintiff may establish a prima facie case of discriminatory discipline by showing that: (1) he belongs to a racial minority; and (2) "for the same or similar conduct, he was treated differently than similarly-situated non-minority employees." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992). The Supreme Court has noted that in comparing employment discipline decisions, "precise equivalence in culpability between employees" is not required. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n. 11 (1976). Rather, the plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.*; *Stotts*, 858 F.2d at 296; *Mitchell*, 964 F.2d at 583 n. 5. The plaintiff must also demonstrate that the non-minority employees to be compared with himself were "similarly-situated *in all respects*." *Mitchell*, 964 F.2d at 583 (emphasis in original). Accordingly,

> [T]he individuals with whom the plaintiff seeks to compare his/her treatment must have dealt

> with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Id.

We agree with Metro that the district court improperly compared the discipline the plaintiff received and the discipline meted out to some of the other blundering employees because those employees were not "similarly-situated" with respect to Mr. Harrison. Thus, H.B. Tomlinson, Ed Watkins and Willie Swafford, each identified by the district court as having received more lenient discipline than the plaintiff, were inappropriate comparables. However, the plaintiff's disciplining may be compared with that of any non-minority rabies control officer under the supervision of Mr. Cole. *Mitchell*, 964 F.2d at 583. For comparison of discipline records, the plaintiff identified Robert Rhodes and Troy Kelley as white rabies control officers who also have poor driving records. We look to see whether their infractions were of "comparable seriousness." *Santa Fe Trail*, 427 U.S. at 283 n. 11.

Mr. Rhodes had twelve motor vehicle accidents in eight years, two of which occurred after the "clean slate" policy was implemented. During Mr. Cole's tenure, Mr. Rhodes was also accused of speeding in a Metro vehicle, and of twice improperly removing a dog from pound property, although there is some dispute over whether the dog incidents occurred during Mr. Cole's administration. For each "type" of infraction – the two driving accidents which occurred after the "clean slate" policy

went into effect, the speeding incident and the dog incidents – Mr. Rhodes received no more than a written reprimand.

Mr. Kelley had four motor vehicle accidents. Two of them occurred after the 1988 "clean slate" cut-off date. He was not disciplined for the first of his post-1988 accidents because the pound did not consider him to be at fault, but then received a written reprimand after his last accident because of his involvement in the collision and because of his failure to notify his supervisor of the accident. In February 1991, Mr. Kelley received another written reprimand for confronting animal rights activists in a hostile manner. In October 1992, he received a third written reprimand after he was found to be intoxicated while on duty. In addition, the testimony at the hearing suggested that Mr. Kelley often came to work while intoxicated, that he was arrested during work hours for driving under the influence of alcohol, and that he was allowed to drive Metro vehicles despite the fact that his driver's license had been revoked for a DUI conviction.

In comparison, the plaintiff was involved in four traffic accidents while driving a Metro vehicle between 1989 and 1992. He received traffic tickets as a result of only two out of the four accidents, and both tickets were ultimately dismissed. He maintained that he was not at fault in one of the instances in which he was ticketed because the accident occurred as a result of a faulty traffic light. Further, Mr. Harrison was accused of encouraging another employee to leave his assigned territory to pick up cats, of being rude to members of the public on two occasions, of failing to report his fourth and final accident to his supervisor and of committing too many paperwork

errors. As a defense witness admitted, the progression of discipline for the plaintiff before his termination was as follows: an oral reprimand for his 1989 accident, a written reprimand for his July 1991 accident, and suspension for picking up cats and securing the help of a co-worker not assigned to that territory. He was ultimately terminated on the stated grounds of a combination of his infractions.

The respective conduct of Mr. Rhodes, Mr. Kelley and Mr. Harrison are of comparable seriousness. Each was involved in multiple driving accidents, although Mr. Rhodes and Mr. Kelley fortuitously had only two such accidents after the "clean slate" policy went into effect. Mr. Rhodes and Mr. Kelley were each involved in other sorts of misconduct at least as comparable in seriousness to that of Mr. Harrison, if not more serious, ranging from rudeness to the public to being intoxicated at work. However, Mr. Harrison was treated differently than his co-workers. The defendants apparently treated Mr. Rhodes' and Mr. Kelley's infractions as falling into separate categories such that neither employee ever received more than a written reprimand. Mr. Harrison's infractions, in contrast, were considered cumulatively, evidenced by the fact that he was suspended without pay for the cat incident even though he had never committed a similar infraction. The plaintiff was also treated differently with respect to his termination, since neither Mr. Rhodes nor Mr. Kelley was terminated as a result of their careless driving standing alone, or taken together with their assortment of other offenses. Also, many other rabies control officers made mistakes in paperwork, but none was ever discharged on that ground.

Having established a prima facie case of disparate treatment, the plaintiff raised an inference that his employer more likely than not took its actions based on impermissible factors. *Burdine*, 450 U.S. at 254 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). The burden then shifted to the defendants to articulate a legitimate, nondiscriminatory reason for their actions. *Id.* at 253-54. Here, the defendants did not offer any reason for suspending Mr. Harrison after his first offense of that particular kind. The presumption of discrimination thus remains, and our inquiry concerning this disciplining is at an end.

As to Mr. Harrison's termination, the defendants pointed out that no other employee had a succession of four accidents after 1988, and no other employee made as many errors in paperwork. Since the defendants met their burden of production on the issue of discriminatory discharge, the plaintiff was left with the burden of proving that the defendants' stated reasons for firing him were pretext for discrimination. *Burdine*, 450 U.S. at 253, 256; *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, ___, 113 S.Ct. 2742, 2747-48 (1993). On this point, the district court explicitly found that "Metro's rationale for firing Mr. Harrison [was] pretextual," and we agree. Although Metro relies on its stated discipline policies, the record shows that neither the "clean slate" policy nor the progressive discipline policies were uniformly applied. In a written reprimand for one of Mr. Rhodes' post-1988 accidents, Mr. Cole admonished Mr. Rhodes for his numerous accidents prior to 1988 despite his "clean slate" policy. And although the plaintiff was terminated, in part, as a result of his fourth accident, he was never suspended

upon his third accident. No evidence was presented as to whether Mr. Rhodes was ever disciplined for his ten accidents before the "clean slate" policy went into effect, although it is undisputed that prior to that time, the civil service rules would have required termination upon four infractions.

Moreover, the district court "question[ed] the legitimacy of Metro's paperwork audit," which supposedly revealed Mr. Harrison's excessive errors. The court found that the defendants' audit showed that Mr. Harrison made 38 errors in comparison to the 12 errors made by all the other employees combined. However, other evidence supported a finding that all comparable employees, and even Mr. Cole himself, made numerous errors. In fact, a witness for the plaintiff testified that her analysis showed that 99 percent of the receipts written out during the period covered by the defendants' audit contained errors.

Whatever the number may have been, the district court found that the defendants' actions or inaction contributed to Mr. Harrison's paperwork troubles. Mr. Harrison was first assigned to paperwork duty in the office in October 1991 and worked in the office only every fifth week. Furthermore, although the defendants claimed that Mr. Harrison was given adequate training for his office duties, the district court accepted Mr. Harrison's contention that he did not. Thus, the record supports the district court's finding that the reasons given for Mr. Harrison's termination were a pretext for discrimination.

On the basis of this record, we find no clear error in the finding of discriminatory discipline, including termination.

5. Harassment and Retaliation

a.

To determine whether the plaintiff was the victim of racial harassment in violation of the 1982 Judgment, we look to the standards applicable to hostile work environment cases under Title VII law. In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that for harassment to be actionable, "it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (quotation marks and citation omitted). The district court relied on relatively few incidents over a rather lengthy period of time to find that the defendants were guilty of harassing the plaintiff in the work setting. Metro argues that some of the incidents had no racial connotations, or were not directed at Mr. Harrison. Metro's principal contention with respect to harassment, however, is that the incidents were too few and isolated to support a finding of racial harassment.

As reprehensible as the incidents of alleged harassment may have been, we do not find that they constituted an unreasonably abusive environment. See *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989). One element required for proof of sexual harassment is that the alleged harassment "had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment. . . . " *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). In *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir.

1989), relying on *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989), we determined that the elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment.

Here, the record reveals that Mr. Harrison testified at the hearing that Mr. Cole's statements, including Mr. Cole's use of a racial epithet, affected him such that he "couldn't hardly think a lot during the day," and had "sleepless and restless nights." Mr. Harrison also testified that he was "rather shocked" in response to a Ku Klux Klan hood incident at work and that it caused him "a lot of stress." Further, the district court observed that a physician who had diagnosed Mr. Harrison as having stress-related situational insomnia stated that Mr. Harrison worked "under a great deal of stress with a manager who is trying to run him off of a job." However, the plaintiff has failed to present evidence that his work performance was affected by the racial hostility, even if only in his own opinion. We conclude that the finding of harassment was therefore clearly erroneous.

b.

The 1964 Civil Rights Act protects an employee who has "opposed any practice made an unlawful employment practice" by Title VII or who has made a charge under the statutory scheme. 42 U.S.C. Sec. 2000e-3(a) (1988). Like a disparate treatment claim, proof of a retaliation claim under federal employment discrimination law is governed by the *McDonnell Douglas/Burdine* tripartite framework of shifting burdens of production and

proof. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). A prima facie retaliation claim is established by showing the following: "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Wrenn*, 808 F.2d at 500; see also *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); compare *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (following the approach in *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982), which subsumes the element of employer knowledge into the causal connection analysis).

Here, Mr. Harrison has engaged in numerous protected activities known to Metro officials and Metro has clearly taken adverse employment actions against him. Mr. Harrison filed suit against Metro in 1980, resulting in the 1982 Judgment. The parties stipulated that since May 1982, Mr. Harrison filed four charges of discrimination with the EEOC regarding discrimination in his employment at the Health Department. He also wrote a memorandum to Mr. Cole complaining of harassment by Mr. Cole, and sent a copy of this memorandum to the director of the Health Department.

Metro contends, however, that there is no causal relationship between the protected activities and the adverse employment actions imposed upon the plaintiff. Specifically, Metro asserts that Mr. Harrison's suspension in August 1991 and his termination in November 1992

were too far removed from the EEOC complaints he filed in 1986 and 1987 to be causally related.

The Tenth Circuit's decision in *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982), cited with approval by this court, has looked to the temporal proximity of the adverse action to the protected activity to determine whether there is a "causal connection." See *Wrenn*, 808 F.2d at 501. Here, the plaintiff filed an EEOC charge at some point after his August 1991 suspension and was thereafter discharged. At most, one year and three months elapsed between his filing of a charge and his termination. In addition, the evidence showed that three employees feared retaliation because they testified at Mr. Harrison's hearing, and that Mr. Cole made repeated comments that suggested he would not hesitate to run employees out of his department. This evidence, taken together with the timetable of Mr. Harrison's EEOC charge and termination, convinces us that the plaintiff established a prima facie case of retaliation.

More important, however, is the fact that study of the record in this case reveals an atmosphere in which the plaintiff's activities were scrutinized more carefully than those of comparably situated employees, both black and white, and that the defendants took every opportunity to make his life as an employee unpleasant. Although the evidence does not support a finding of racial harassment, we conclude that it does support a finding a retaliation. Given our earlier approval of the district court's finding that the defendants' proffered reasons for terminating the plaintiff were pretextual, the district court's finding of retaliation was not clearly erroneous.

CONCLUSION

Although we have found two of the district court's findings clearly erroneous, we are not required to set aside the finding of contempt. See *Glover*, 934 F.2d at 717. The judge who entered the 1982 consent decree was the same judge who found the defendants in contempt of the injunctive portions of that decree. Judge Nixon's interpretation of his own order is "entitled to great deference." *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991). See also *Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir. 1993) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.") (quoting *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir. 1981)).

Furthermore, there is evidence that Metro did not consider the consent decree to be very important. Remarkably, both Mr. Cole, who was the plaintiff's direct supervisor, and Dr. Wadley, who actually terminated the plaintiff, testified that although they knew of Mr. Harrison's EEOC filings, they knew nothing of the existence of the consent decree. Mr. Cole testified that no one at Metro informed him there was a consent decree in effect. Dr. Wadley testified that she knew of the plaintiff's EEOC filings but did not know that Metro was under a court order to train Mr. Harrison properly and not to discriminate against him. The district court did not abuse its discretion in finding the defendants in contempt.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** to the district court for its determination of whether our partial reversal requires any changes in remedy.

KENNEDY, Circuit Judge. Concurring in part and dissenting in part. I concur in all of the majority opinion except parts II(B)(2) and II(B)(4).

First, in part II(B)(2), the court affirms the District Court's finding that Metro had violated the 1982 consent judgment by failing to promote plaintiff to Rabies Control Officer III. Defendant argued that no promotions to Rabies Control Officer III were available after plaintiff's reinstatement. In its order denying defendant's motion for stay of judgment, the District Court stated "it was Defendant's unlawful conduct that resulted in Plaintiff being terminated, and Defendant should not be rewarded for taking actions during Plaintiff's illegal termination which then made it 'impossible' for Defendant to comply with the Court's Order."

These promotions – one of someone with more seniority and the other two, one black and one white – were made before entry of the consent judgment, a judgment entered without any finding that the termination was illegal but by consent without any admission of liability.[1]

The relevant portion of the Order, of which Metro had been found in contempt, orders Metro to

> B. Provide Mr. Harrison with any on-the-job training necessary to perform efficiently in the position and for promotion to the position of

---

[1] There is no claim and no indication in the record that plaintiff was unaware of those promotions at the time he settled his earlier discharge case and entered into the consent judgment. These contempt proceedings were brought more than ten years after the 1982 consent judgment.

> Rabies Control Officer III upon such position becoming available and Mr. Harrison meeting the qualifications therefor.

This provision does not entitle Mr. Harrison to a promotion; it conditions such a promotion on a Rabies Control Officer III position becoming available and Mr. Harrison being found to hold the requisite qualifications. Indeed, if Harrison had the qualifications for that office, there would be no need to give him the training. Thus, to the extent the District Court found this provision entitled Mr. Harrison to a promotion, it was in error.

Moreover, the District Court made no factual findings that Metro somehow violated this provision of the Order by promoting white employees immediately before the Order took effect. In the section of its opinion entitled "Factual Findings," the District Court merely noted that "[t]wo employees with less seniority than Mr. Harrison . . . were promoted to Rabies Control Officer III positions." There is no acknowledgement that these promotions occurred before the consent decree was signed. Likewise, in its "Conclusion of Law" section, the District Court wrote: "Mr. Harrison . . . was never promoted to a Rabies Officer III position. Notably, employees junior to Mr. Harrison served in the position of Rabies Control Officer III. . . .

There is no legal or factual basis to find that Metro violated the consent judgment by these earlier promotions. Since the District Court gave no remedy for the failure to promote plaintiff to Rabies Officer III except to continue the requirement that plaintiff be trained for future promotions, the court's error might be found to be harmless. However, to the extent that it may have

included its erroneous conclusion regarding these prior promotions in resolving other issues and particularly the issue of pretext, I would require the District Court to reconsider that issue anew on remand.

Second, while I agree with the majority that there is evidence to support the District Court's finding of discrimination in defendant's treatment of plaintiff's paper errors, and therefore in his firing, I cannot agree that the District Court was entitled to compare plaintiff's treatment under the clean slate policy with the treatment of persons with accidents before the clean slate policy unless there is some claim – which there is not – that the adoption of the clean slate policy was discriminatory.

Plaintiff's driving infractions occurred after the introduction of the clean slate policy. He was not, therefore, similarly situated in all respects. Under the policy, he could be fired for four accidents. Under the policy, Mr. Rhodes could not be fired. His earlier accidents were wiped clean. Thus, while the court was entitled to compare the treatment of Rhodes with respect to other infractions versus the treatment of plaintiff's errors, it was not, in my opinion, entitled to compare the driving infractions.

I would set aside the above findings and remand for further consideration by the District Court.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT DALE HARRISON	]	
	]	
vs.	]	No. 80-3271
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body corporate and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body politic, and DR. JOE M. STRAYHORN, MRS. ELIZABETH L. JACOBS, DR. DOROTHY L. BROWN, MRS. GAIL PIGG, DR. HAROLD JORDAN, MRS. REBECCA CLARK CULPEPPER, who constitute all of the members of said BOARD OF HEALTH and JOSEPH M. BISTOWISH, M.D.	]	

MEMORANDUM

Pending before the Court is Defendant Metropolitan Government of Nashville and Davidson County, Tennessee ["Metro"]'s Motion For Stay Of Judgment (Doc. No. 49), filed on July 14, 1994, to which Plaintiff filed an Opposition (Doc. No. 52) on July 27, 1994.

I. BACKGROUND

By Memorandum and Order entered on June 14, 1994 (Doc. Nos. 40, 41), the Court found Metro in civil contempt of the Court's Order of Judgment entered on May 17, 1982. The Court therefore awarded Plaintiff Robert Dale Harrison damages and fees and costs in the amount of $77,864.33. (Ord., Doc. No. 41; Ord., Doc. No. 47.) In addition, the Court granted Plaintiff's request for injunctive relief and ordered Metro to do the following: (1) Reinstate Plaintiff in the position of Senior Rabies Control Officer in the Rabies Control Division of the Health Department at a minimum salary of $23,072.00 per year, plus any salary increases to which he may be entitled; (2) Train Plaintiff to perform efficiently in the position and for promotion to a higher pay step; (3) Provide Plaintiff with the type of supervisory opportunities usually awarded Senior Rabies Control Officers; (4) Calculate job seniority and annual and sick leave as if there had been no break in Plaintiff's employment; (5) Announce publicly all training and promotional opportunities relevant to Rabies Control personnel; (6) Refrain from discriminating against Plaintiff or other black persons on account of race, or in retaliation for Plaintiff's complaints against racial discrimination or this lawsuit; and (7) Communicate the contents of the Court's June 14, 1994 Memorandum and Order to employees in a supervisory position to Plaintiff at the Health Department. (Ord., Doc. No. 41.)

Defendant Metro now moves the Court pursuant to Rule 62 of the Federal Rules of Civil Procedure to stay its judgment pending the outcome of Metro's appeal in this action. (Def.'s Mot. Stay, Doc. No. 49.) Metro has submitted a supersedeas bond in the amount of $100,000.00

(Doc. No. 51) for the Court's approval under Rule 62(d). Plaintiff opposes Defendant's motion for stay on the grounds that Defendant has failed to submit a proper or sufficient supersedeas bond to entitle Defendant to a stay of either the money judgment or the injunctive relief awarded in this action. (Pl.'s Opp'n, Doc. No. 52, at 2.) Regardless of whether the Court approves Defendant's supersedeas bond, Plaintiff argues that Defendant has failed to meet its burden to prove that it is entitled to a stay of the injunctive relief awarded. (*Id.*)

II. ANALYSIS

Rule 62(d) of the Federal Rules of Civil Procedure provides that "[w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule." Fed. R. Civ. P. 62(d). Under Rule 62(a), unless otherwise ordered by the Court, an injunction shall not be stayed during the pendency of an appeal except in accordance with Rule 62(c), which governs the suspension of injunctions pending appeal. Fed. R. Civ. P. 62(a). Rule 62(c) provides that "[a] court in its discretion may suspend . . . an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c).

Accordingly, although an injunction is stayed under Rule 62(c) only at the court's discretion, a money judgment is stayed automatically under Rule 62(d), effective upon the court's approval of an appellant's supersedeas bond.

A. Money Judgment

In the instant action, the Court finds that Defendant has provided an appropriate Rule 62(d) supersedeas bond in the amount of $100,000.00. The Court therefore approves Defendant's supersedeas bond, and stays the money judgment awarded to Plaintiff.

B. Injunctive Relief

In determining a motion to stay a court order under Rule 62(c), a court is guided by the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987); *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991).

1. Whether the stay applicant has made a strong showing that he is likely to succeed on the merits?

The Court finds that Defendant Metro has not made a strong showing that it is likely to succeed on the merits. The Court instructs Defendant that Defendant has mischaracterized the Court's analysis. By clear and convincing evidence, the Court found Defendant in civil contempt. *See Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991). The Court applied the standard of *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989), and determined that

Defendant failed to take all reasonable steps to achieve substantial compliance with the Court's previous order. Specifically, the Court found that Defendant merely paid Plaintiff money damages and reinstated him. Defendant apparently ignored the remainder of the Court's Order, including the explicit mandate to train and promote Plaintiff and to refrain from retaliating against him.

The Court agrees with Defendant's observation that the Court heard conflicting testimony at the contempt hearing. However, the Court ultimately found that Plaintiff was not trained, promoted, or accorded seniority as required by the Court's previous Order, and that Plaintiff was selectively punished by Defendant for reasons the Court found pretextual. The Court specifically rejected Defendant's argument that Defendant failed to promote Plaintiff as ordered because no promotions to Rabies Control Officer III were available after Plaintiff was reinstated. Notably, it was Defendant's unlawful conduct that resulted in Plaintiff being terminated, and Defendant should not be rewarded for taking actions during Plaintiff's illegal termination which then made it "impossible" for Defendant to comply with the Court's Order. Finally, the Court found Defendant's witness Larry Cole to be completely incredible.

2. Whether the applicant will be irreparably injured absent a stay?

Defendant argues that it will be irreparably harmed because Plaintiff's reinstatement will only exacerbate the "disagreements" Mr. Cole has with other African-American employees. The Court rejects Defendant's argument,

and finds that no irreparable harm will result from reinstating Plaintiff.

3. Whether issuance of the stay will substantially injure the other parties interested in the proceeding?

By contrast, the record establishes that the issuance of a stay will substantially injure Plaintiff. Plaintiff has suffered emotional distress, financial deprivation, and health problems in relation to his wrongful discharge. As well, Plaintiff's continued absence will only reinforce tensions currently existing among employees at the Pound.

4. Where the public interest lies?

As Defendant concedes, the public has an interest in remedying racial discrimination and in enforcing judgments made by the Court. The Court rejects Defendant's suggestion that the interest in holding a wrongdoer accountable is somehow outweighed by the public's interest in the efficient operation of Metro's Rabies Control Division.

Accordingly, the Court concludes that Defendant has failed to carry its burden, and denies Defendant's motion to stay the Court's order with respect to the injunctive relief awarded.

III. CONCLUSION

For the above-stated reasons, the Court hereby grants in part and denies in part Defendant's motion for stay.

Accordingly, the Court approves Defendant's supersedeas bond, and stays its June 14, 1994 judgment (Doc. No. 41) with respect to the monetary damages awarded; and denies Defendant's motion for stay with respect to any injunctive relief awarded.

An Order consistent with the findings herein is filed contemporaneously.

Entered this the 1st day of September, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT DALE HARRISON	]	
	]	
vs.	]	No. 80-3271
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body corporate and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body politic, and DR. JOE M. STRAYHORN, MRS. ELIZABETH L. JACOBS, DR. DOROTHY L. BROWN, MRS. GAIL PIGG, DR. HAROLD JORDAN, MRS. REBECCA CLARK CULPEPPER, who constitute all of the members of said BOARD OF HEALTH and JOSEPH M. BISTOWISH, M.D.	]	

ORDER

Pending before the Court is defendant Metropolitan Government of Nashville and Davidson County, Tennessee ["Metro"]'s Motion For Stay Of Judgment (Doc. No. 49), filed on July 14, 1994, to which plaintiff filed an Opposition (Doc. No. 52) on July 27, 1994.

Consistent with the contemporaneously-filed Memorandum, the

Court hereby GRANTS IN PART and DENIES IN PART defendant's motion for stay. Accordingly, the Court

APPROVES Defendant's supersedeas bond, and STAYS its June 14, 1994 judgment (Doc. No. 41) with respect to the monetary damages awarded; and DENIES Defendant's motion for stay with respect to any injunctive relief awarded.

Entered this the 1st day of September, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT DALE HARRISON	]	
vs.	]	
	]	No. 80-3271
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body corporate and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body politic, and DR. JOE M. STRAYHORN, MRS. ELIZABETH L. JACOBS, DR. DOROTHY L. BROWN, MRS. GAIL PIGG, DR. HAROLD JORDAN, MRS. REBECCA CLARK CULPEPPER, who constitute all of the members of said BOARD OF HEALTH and JOSEPH M. BISTOWISH, M.D.	]	

MEMORANDUM

This matter was heard upon plaintiff's Petition to adjudicate defendant Metropolitan Government of Nashville and Davidson County, Tennessee, in civil contempt of this Court's Order of Judgment entered on May 17, 1982, in the above-styled case. Upon the evidence presented, record as a whole, and argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law, in accordance with Fed. R. Civ. P. 52(a).

I. FINDINGS OF FACT

1. Plaintiff Robert Dale Harrison, a black male, was hired by defendant Metropolitan Government of Nashville and Davidson County, Tennessee, ["Metro"] on June 2, 1972. (Joint Ex. 1, at 1.) Mr. Harrison was hired to work in the Rabies Control Division of Metro's Department of Health ["Health Department"]. (Compl., at 3.) The Rabies Control Division is located in the Animal Control Facility ["pound" or "dog pound"].

2. Mr. Harrison originally filed this action on June 18, 1980, pursuant to 42 U.S.C. §§ 1981, 1982, 1983, 1986, and 1988, 42 U.S.C. §§ 2000d and 2000e, and the Thirteenth and Fourteenth Amendments to the United States Constitution, alleging race discrimination in his employment with the Health Department. (Compl., at 1-2.) Mr. Harrison alleged that the Health Department had failed to promote him while white employees with less experience and seniority were promoted; harassed and intimidated him after he filed a charge with the Equal Employment Opportunity Commission ["EEOC"]; and failed to provide him with training and equal employment opportunities. (*Id.* at 3-6.)

3. On May 17, 1982, the Court entered an Agreed Order of Judgment which required Metro to:

> A. Rehire Mr. Harrison at the position of Rabies Control Officer II in the Rabies Control Division of the Health Department at a minimum salary of $1,057.00 per month, plus any pay increments or raises to which he may be entitled.

B. Provide Mr. Harrison with any on-the-job training necessary to perform efficiently in the position and for promotion to the position of Rabies Control Officer III upon such position becoming available and Mr. Harrison meeting the qualifications therefor.

C. Calculate and award job seniority and annual leave and sick days as if Mr. Harrison had been on the job with no break in service, and award a minimum of eighteen days of annual leave and sick days.

D. Pay back pay to Mr. Harrison in the amount of $15,000.00, less necessary deductions for Federal Income Tax and FICA; pay attorney's fees to counsel for Mr. Harrison in the amount of $5,000.00, over and above the back pay award; and pay all costs resulting from this action.

E. Not discriminate against Mr. Harrison or other black persons on account of race, or on account of Mr. Harrison's complaints against racial discrimination or this lawsuit.

(Agreed Ord. J., at 1-2.) The Court's May 17, 1982, Order also released the parties from further liability, and dismissed the charges against defendants "upon defendants' compliance with th[e] Order of Judgment." (*Id.* at 2.)

4. After entry of the Court's Agreed Order of Judgment on May 17, 1982, the Health Department reinstated Mr. Harrison to employment in the position of Rabies Control Officer II and paid Mr. Harrison $20,000.00 in damages. (Tr. Vol. I, at 17.)

5. On November 2, 1992, Mr. Harrison was terminated from his employment at the pound for careless

driving, paperwork errors, and rudeness. (Defs.' Ex. 6.) Mr. Harrison appealed his termination, and the Board of Health held a hearing on February 3, 1993. (*Id.*) The Board upheld Mr. Harrison's termination on the grounds of careless driving and paperwork errors. (*Id.*)

6. On December 30, 1993, Mr. Harrison filed a motion for contempt, alleging that defendant Metro had continued to discriminate and retaliate against Mr. Harrison in violation of this Court's May 17, 1982, Order. Mr. Harrison filed a motion to reopen the case on January 4, 1994.

7. The Court held a hearing on Mr. Harrison's motion for contempt on March 28, March 31, April 6, and April 8, 1994.

Training

8. Between the entry of this Court's Order on May 17, 1982, and the time Mr. Harrison was fired on November 3, 1992, the evidence indicates that Mr. Harrison was never provided with any training, except for euthanasia training from which he was excused. (Tr. Vol. I, at 18-19, 137-38; Tr. Vol. IV, at 23-24; Pl.'s Ex. 32.) According to the training record maintained by Metro, Mr. Harrison received no training whatsoever after 1974. (Pl.'s Ex. 32.) Moreover, notices regarding training opportunities were not posted or provided to Mr. Harrison. (Tr. Vol. I, at 19, 210.)

9. By contrast, white employees who had less seniority than Mr. Harrison, including Billy Hendrixson, Victoria Maxwell, and Kenneth Chambers, did receive training. (Tr. Vol. I, at 19, 210, 223-24; Joint Ex. 1.) Mr.

Hendrixson and Mr. Chambers received training at the Stahlman Building, including training in supervision and animal control, and were sent out of town to receive training. (Tr. Vol. I, at 19.) As a result of such training, Mr. Hendrixson and Mr. Chambers received certificates. (*Id.*)

10. Mr. Harrison learned that particular training sessions had occurred only after they had taken place when white employees such as Mr. Hendrixson and Mr. Chambers discussed the training sessions. (Tr. Vol. I, at 19, 210.) Darrell Acklin, Jeffrey Baker, and Robert Harrison all testified that they had never seen any training opportunities posted on the bulletin board at the pound. (*Id.*; Tr. Vol. IV, at 40, 43.) Robert Gibbs testified that no training relevant to animal control was posted on the bulletin board, and that he became aware that a relevant training had been offered when someone who had attended the training mentioned it after the fact. (Tr. Vol. IV, at 52.)

Promotion

11. Based on restoration of his seniority as required by the Court's May 17, 1982, Order, Mr. Harrison was the second most senior employee at the dog pound when he was reinstated. (Joint Ex. 1; Tr. Vol. I, at 20.) The most senior employee at the pound was Robert Gibbs, who is also black. (Tr. Vol. I, at 20.)

12. Mr. Harrison was never promoted to a Rabies Control Officer III position. (Tr. Vol. I, at 29.) Two employees with less seniority than Mr. Harrison, Ronald Cartwright and Kenneth Chambers, were promoted to Rabies Control Officer III positions. (Tr. Vol. I, at 25-26,

29; Joint Ex. 1, at 1.) Mr. Gibbs also served in the position of Rabies Control Officer III. (Tr. Vol. I, at 85.)

13. In October, 1989, the Rabies Control Officer II and Rabies Control Officer III employment classifications were abolished, and a new classification, "Senior Rabies Control Officer", was established. (Tr. Vol. I, at 30-31, 88.) The former Rabies Control Officer III positions were then transitioned to Senior Rabies Control Officer ["Senior Officer"] positions. (*Id.* at 30-31.) As well, Mr. Harrison and Billy Hendrixson, the two employees who had formerly served in the position of Rabies Control Officer II, were also transitioned to Senior Officer positions. (*Id.*) Mr. Harrison and Mr. Hendrixson were transitioned at a lower pay step within the Senior Officer classification, however, than the former Rabies Control Officer III employees.

14. Metropolitan Government Civil Service Rules and Regulations ["Civil Service Rules"] require that job openings which would provide promotional opportunities "must be announced and advertised in such a manner that all eligible and qualified employees within the [Health] [D]epartment shall have an opportunity to apply." (Pl.'s Ex. 1, at 14.) Between May 17, 1982, and Mr. Harrison's discharge in 1992, Promotional opportunities were neither publicly posted nor made known to Mr. Harrison. (Tr. Vol. I, at 21, 24, 210.) Instead, information regarding promotional opportunities was provided to individuals by word of mouth. (*Id.* at 21.)

15. Nevertheless, Mr. Harrison filed an application for promotion to a Rabies Control Officer III position on both July 25, 1984, and August 20, 1988, in the event that

such a position was available but unknown to him. (Pl.'s Exs. 2, 3.) On September 19, 1988, Mr. Harrison applied for the position of Rabies Control Manager, or Manager of the pound. (Pl.'s Ex. 4.) Mr. Harrison also took a test for the Rabies Control Manager position and scored well on it. (Tr. Vol. I, at 33.)

16. Mr. Harrison was denied all of these positions. (Tr. Vol. I, at 29.) By memorandum dated October 11, 1988, Leslie Robeson, an Officer of the Health Department, informed Mr. Harrison that his qualifications were "found appropriate" and his application and experience were given "serious consideration." (Pl.'s Ex. 5.) The Manager position was ultimately awarded to Larry Cole, an individual who had no prior experience in animal control and who had previously worked as a vehicle inspector in the motor vehicle inspection program of Metro's Air Pollution Division. (Tr. Vol. I, at 34, 154; Tr. Vol. IiI, at 12.)

17. In the course of Mr. Harrison's twenty-year employment with the Health Department, Mr. Harrison trained many Rabies Control Helpers who later became Rabies Control Officers, including Jeffrey Baker, Randall Morris, Tommy Morris, Kenneth Davis, Troy Kelley, Robert Rhodes, and Darrell Acklin. (Tr. Vol. I, at 33-34.) During that same time period, Mr. Harrison received standard or above standard ratings on all of his performance evaluations except two. (Stipulation, Doc. No. 32, at 1.)

18. Other black current and former employees of the pound testified that they had also been denied promotion. Jeffrey Baker stated that Victoria Maxwell, a

white employee, had been promoted to a supervisory position that Mr. Baker would have liked, if the availability of the position had been posted. (Joint Ex. 1, at 1; Tr. Vol. I, at 208-10.) Mr. Baker has six years more seniority than Ms. Maxwell. (Joint Ex. 1, at 1.) Mr. Baker also noted that he had been passed over several times for "on-call" duty. (Tr. Vol. I, at 216-17.) On-call duty is desirable because it generally enables an employee to gain more experience and receive overtime pay. (Tr. Vol. I, 216-17.)

19. In February, 1992, Darrell Acklin applied for a Rabies Control Officer position. (Pl.'s Ex. 46.) At that time, Mr. Acklin had three and one-half years experience at the pound. (Tr. Vol. IV, at 38.) Buddy Kent, a white man with no previous experience working at the pound, was chosen for the position instead. (*Id.* at 19-20, 39.) Mr. Kent was fired a month after being hired because he was unable to perform the job. (*Id.* at 20.)

20. Mr. Gibbs twice applied for and was denied a promotion to a position as Quarantine Officer. (Tr. Vol. I, at 173-74.) The Quarantine Officer position is desirable because a Quarantine Officer generally receives overtime pay. (Tr. Vol. II. at 157-58.) When Mr. Gibbs was denied, the first time, the Quarantine Officer position was given to Tommy Martin, an individual who had never worked for Metro government. (Tr. Vol. I, at 174.) When Mr. Gibbs was denied the second time, the position was awarded to Kenneth Chambers, a junior white employee. (*Id.* at 173, 75; Joint Ex. 1, at 1.) Mr. Gibbs was also denied the Manager position, which was given to Mr. Cole, even though Mr. Gibbs was the most senior employee at the

pound and had served for three months as interim Manager prior to Mr. Cole's selection as Manager. (Pl.'s Ex. 35; Tr. Vol. I, at 171-72; Tr. Vol. III, at 10-11.)

Different Treatment

21. Mr. Harrison was not allowed to work in the office at the pound until October, 1991. (Tr. Vol. I, at 59-60, 154.) Rabies Control Officers who work in the field are generally required to do the same tasks as Rabies Control Helpers, including chasing dogs, pulling dogs out from under houses, burying dead and decomposed animals, and removing the heads from dogs so that the heads can be examined for rabies contamination. (Tr. Vol. II, at 131-32; Pl.'s Ex. 34.) Rabies Control Officers who work in the office do not perform such duties. (Tr. Vol. I, at 150-51; Tr. Vol. II, at 145-46.)

22. Mr. Gibbs testified that he was removed from the office at the pound and put back to work in the field after he successfully appealed an adverse personnel decision by former Health Department Director Dr. Joseph Bistowish to the Board of Health. (Tr. Vol. IV, at 44-45.) In addition, Mr. Gibbs was again displaced from his assignment at the office and his office keys were removed over his objections when a junior white employee, Robert Rhodes, retuned from sick leave. (Tr. Vol. IV, at 46-48; Pl.'s Exs. 16, 16A.) At the same time, Kenneth Chambers, another white employee with less seniority than Mr. Gibbs, remained in the office as Quarantine Officer. (Tr. Vol. IV, at 46.) Mr. Gibbs testified that he is not allowed to work in the office and was "put out on the street",

despite the fact that he has experience doing paperwork. (Tr. Vol. I, at 171-72.)

23. Both Billy Hendrixson and Robert Rhodes are on permanent light duty at the pound. (Tr. Vol. III, at 52; Tr. Vol. II, at 150.) When Mr. Harrison had a back injury which required light work, however, he was advised that no light duty was available at the pound, and that if he was unable to perform his usual duties he would have to resign or be fired. (Tr. Vol. V, at 70.)

24. In addition, Mr. Cole admitted that he assigned supervisory duties to every Senior Rabies Control Officer except Mr. Harrison. (Tr. Vol. IV, at 23; Pl.'s Ex. 49.)

25. The Personnel Director for the Health Department, Robert Eadie, testified that persons with more seniority are entitled to more longevity pay. (Tr. Vol. II, at 138-39.) As well, employees receive increment pay raises whenever they have a performance evaluation which is satisfactory or above. (Tr. Vol. II, at 135.)

26. At the time of Mr. Harrison's discharge in 1992, all of the other Senior Rabies Control Officers received a higher salary than Mr. Harrison. (Pl.'s Ex. 13.) Mr. Harrison was paid less than Billy Hendrixson, Kenneth Chambers, and Ronald Cartwright, all of whom had less seniority than Mr. Harrison. (*Id.*) At that time, Mr. Hendrixson had fourteen years seniority, Mr. Chambers had sixteen years, and Mr. Cartwright had eighteen years, while Mr. Harrison had twenty years seniority. (Joint Ex. 1, at 1.)

27. The Civil Service Rules specify that a progressive disciplinary policy should be utilized for infractions

of rules or policies. (Pl.'s Ex. 1, at 42.) Accordingly, in disciplining an employee, the means used would be in the following order: written reprimand, suspension, demotion, and dismissal. (*Id.*)

28. In August, 1991, Mr. Harrison was suspended for three days on the grounds that he had encouraged another employee, Mr. Baker, to leave Mr. Baker's territory and assist Mr. Harrison in picking up cats, as well as on the grounds that the Health Department is not authorized to catch and impound cats. (Tr. Vol. I, at 41, 43; Tr. Vol. II, at 23, 31-32, 72; Tr. Vol. III, 70, 73.) At that time, Mr. Harrison had no supervisory authority over Mr. Baker. (Tr. Vol. I, at 44.) Prior to the incident, Mr. Harrison had never been accused of being out of his territory or of encouraging another employee to leave such employee's territory. (Tr. Vol. I, at 153-54; Tr. Vol. II, at 23-24.) By comparison, other employees who had been absent from their territory on more than one occasion were not suspended. (Tr. Vol. II, at 28-29, 59-62; Pl.'s Exs. 19, 23.)

29. Although Mr. Harrison was disciplined in August, 1991, in part because he allegedly had no authority to pick up cats, the job description for a Rabies Control Officer reflects that one of Mr. Harrison's duties was to pick up cats. (Pl.'s Ex. 6.) Indeed, Mr. Gibbs was dispatched to pick up two cats only weeks before the Contempt Hearing in this matter. (Tr. Vol. I, at 195-96.)

30. After October, 1988, the Health Department instituted a progressive discipline policy for employees at the pound who had accidents while driving Metro motor vehicles in which the employees appeared to be at fault. (Tr. Vol. III, at 74.) The first such accident would result in

an oral reprimand; the second in a written reprimand; the third in suspension; and the fourth could lead to dismissal. (*Id.*) This policy was communicated to the employees. (*Id.*)

31. When Mr. Cole became Manager, he also announced a new policy that prior disciplinary problems would not be considered, and that all employees at the pound would be given a "clean slate". (Tr. Vol. I, at 99; Tr. Vol. III, at 50-51, 74.)

32. Nevertheless, in an October 11, 1988, memorandum to Mr. Rhodes, Mr. Cole admonished Mr. Rhodes for having seven accidents since 1984, and referred to accidents which occurred prior to the institution of the "clean slate" policy. (Pl.'s Ex. 11, at 4.)

33. During his employment with Metro, Mr. Harrison was involved in four accidents while driving a Metro motor vehicle. (Tr. Vol. I, at 119; Tr. Vol. III, at 75-76; Defs.' Ex. 6.) Mr. Harrison's accidents included two in which he hit other vehicles in the rear; one in which he backed into another vehicle; and one in which he collided with a police car at an intersection. (Tr. Vol. II, at 76-77.) Mr. Harrison asserts that the accident involving the police car was due to a faulty traffic light. (Tr. Vol. I, at 50.) Notably, a ticket Mr. Harrison received for that accident was ultimately dismissed. (*Id.*) The only other ticket Mr. Harrison received for an accident was also dismissed. (Defs.' Ex. 6.)

34. Mr. Harrison was disciplined for allegedly failing to report his fourth and last accident in September, 1992. (Defs.' Ex. 6; Tr. Vol. I, at 53; Tr. Vol. III, at 77-78.) At that time, the Health Department had no written policy

indicating how accidents should be reported to an employee's supervisor, or specifying a manner of reporting which was different from that used by Mr. Harrison. (Pl.'s Ex. 1; Tr. Vol. I, at 145.) Mr. Harrison had called into the office to report his first three accidents. (Tr. Vol. III, at 77.)

35. The parties are in disagreement as to what actually happened after Mr. Harrison's fourth accident. Mr. Harrison testified that he attempted to contact Mr. Cole, but that he was informed by another employee, Robert Rhodes, that Mr. Cole was unavailable. (Tr. Vol. I, at 53-54.) Mr. Harrison further stated that he informed Mr. Rhodes about the accident and then went to retrieve his driver's license, which had been inadvertently taken from the scene of the accident. (*Id.*) Upon returning to the pound, Mr. Harrison spoke with Mr. Cole directly about the accident. (Tr. Vol. I, at 54-55; Tr. Vol. III, at 77-78.) Mr. Cole maintains that he was first advised of the accident upon Mr. Harrison's return to the pound, several hours after the accident had occurred. (Tr. Vol. III, at 77-78.)

36. Mr. Harrison's careless driving was one of two grounds cited for Mr. Harrison's dismissal. (Defs.' Ex. 6.) Mr. Harrison was also dismissed for failing to complete paperwork properly. (*Id.*; Tr. Vol. III, at 23, 74.) Metro discovered the paperwork errors after conducting an audit of all paperwork completed between October 29, 1991, to July 27, 1992. (Defs.' Ex. 10.) On July 31, 1992, Paul Bontrager, Director of the Bureau of Environmental Health Services at the Health Department, issued a memorandum to all Rabies Control personnel in which he described specific errors that employees were to avoid on receipts, and to which he attached exemplars of properly-

completed receipts. (Pl.'s Ex. 25; Tr. Vol. II, at 236.) The specific items highlighted by Mr. Bontrager in his memorandum were: marking the number of days an animal was impounded; writing out the total amount of money collected; marking a line through an error, so as to leave it readable, and initialing it with the initials of the officer completing the receipt; and having the owner initial the receipt, if the error was in the total amount collected. (*Id.*)

37. Metro asserts that between October 29, 1991, and July 27, 1992, Mr. Harrison made thirty-eight (38) errors, and that all other employees combined made twelve (12) errors. (Tr. Vol. V, at 10-40, 56; Defs.' Ex. 10.) Metro computed the number of errors by looking for the following: errors in math; errors in failing to enter vaccination numbers; entry of fees in wrong place; failure to require Tennessee license; entry of improper dollar figures for adopted dogs; and entry of non-existent fee. (Tr. Vol. V, at 10-40; Defs.' Ex. 10.) There is no allegation or suggestion in the record that Mr. Harrison misused funds.

38. Mr. Harrison also conducted an analysis of paperwork errors. By Mr. Harrison's accounting, Kenneth Chambers had 1,628 errors, Billy Hendrixson had 317 errors, Larry Cole had 359 errors, Ronald Cartwright had 324 errors, Victoria Maxwell had 387 errors, and Robert Harrison had 291 errors. (Pl.'s Ex. 48.) Mr. Harrison computed errors by looking at such items as: failure to circle adopted or impoundment; failure to state number of days of impoundment; failure to write out dollar amount; entry of non-existent ("unaccountable") fee; blacked out mistake, instead of line through; math error; both owner and adoption box marked; no mark in owner or adoption

box; correction not initialed by employee; illegible; no signature by employee; voided without explanation; type of offense not indicated; change of total not initialed by owner; and dollar amount not written correctly. (Tr. Vol. V, at 58-59; Pl.'s Ex. 48.)

39. By either system of accounting, many paperwork errors were committed by various employees at the pound. (Pl.'s Ex. 48; Defs.' Ex. 10.) Moreover, Metro concedes that other employees made paperwork errors and were not discharged. (Tr. Vol. I, at 141-42.)

40. Notably, Mr. Harrison did not begin working in the office or completing paperwork until October, 1991. (Tr. Vol. I, at 59-60.) Mr. Harrison worked in the office only one week out of five thereafter. (Tr. Vol. I, at 60-61; Pl.'s Ex. 8.) In addition, Mr. Harrison received no training in how to complete paperwork prior to being assigned to office duty. (*Id.* at 61-62, 176.) While Mr. Harrison worked in the office, the chart of fees to be charged was removed from the door. (*Id.* at 72; Pl.'s Ex. 7.)

41. When Mr. Harrison protested the removal of the chart, Mr. Cole responded that Mr. Harrison should know the charges after eighteen years of employment. (Pl.'s Exs. 7, 8.) During the Contempt Hearing, Mr. Cole attempted to compute the same fees without the assistance of a chart, and likewise failed to compute the fees accurately. (Tr. Vol. I, at 116-17; Pl.'s Ex. 9.)

42. Finally, Metro accused Mr. Harrison of being rude to a member of the public, Dr. Howard Salyer, who is also a friend of and dermatologist to Robert Thomas, Chairman of the Board of Health. (Tr. Vol. I, at 65-66; Pl.'s Exs. 20, 28.) Upon investigation, the Board of Health

concluded that Mr. Harrison had not been rude to Dr. Salyer. (Defs.' Ex. 6.) As late as January, 1992, Mr. Harrison was rated "above standard" for his personal relationships and his relationships with the public. (Tr. Vol. I, at 147.)

43. Several other employees at the pound received only a written reprimand for committing a variety of infractions, including being involved in accidents while driving Metro motor vehicles. For example, Robert Rhodes had twelve such accidents, some of which required Metro to pay claims. (Pl.'s Ex. 11; Tr. Vol. I, at 122-30.) Mr. Rhodes also received written reprimands for driving eighty-five (85) miles per hour, and both oral and written reprimands for taking dogs home from the pound. (Pl.'s Exs. 11, 12; Tr. Vol. I, at 127-29.) Despite these numerous offenses, Mr. Rhodes never received anything more than a written reprimand. (Tr. Vol. I, at 122-30.)

44. Another employee, Ed Watkins, received only a written reprimand on June 25, 1990, after having his seventh accident in a Metro vehicle in six years. (Pl.'s Ex. 40; Tr. Vol. II, at 168-69.)

45. Troy Kelley received only written reprimands for using abusive language and threatening the public at a Board of Health meeting, and for failing to report an accident to his supervisor. (Pl.'s Ex. 10.) Mr. Kelley was also known to be intoxicated during working hours by his superivosr, Mr. Cole. (Pl.'s Ex. 10; Tr. Vol. I, at 133, 211, 213.) In 1988, Mr. Cole went to the Metro jail to assist Mr. Kelley after he had been arrested for driving under the influence ["DUI"] during working hours. (Tr. Vol. I, at

134-35.) Mr. Kelley was allowed to continue in his duties and to drive Metro vehicles while his driver's license was revoked due to his DUI convictions. (Pl.'s Ex. 41; Tr. Vol. II, at 172-73.) Although Mr. Kelley also failed to show up for work and failed to respond when called on the radio, he was not discharged. (Pl.'s Ex. 10.) Mr. Kelley received only a written reprimand and remained employed even after he was removed from being "on call" for being intoxicated and failing to respond to calls. (*Id.*; Tr. Vol. I, at 71.)

46. Willie Swafford, former Manager of the pound, stole significant amounts of money from the pound. Nevertheless, he was allowed to resign and was not discharged. (Tr. Vol. I, at 33; Vol. II, at 52-53; Pl.'s Ex. 21.)

Discrimination/Retaliation

47. At this Court's Contempt Hearing, three different witnesses, Robert Gibbs, Jeffrey Baker, and Earl Woods, testified that they believed Metro would retaliate against them for testifying. (Tr. Vol. I, at 170, 187-88, 199-200, 214-15, 259.) All three witnesses are black employees of the pound. (Joint Ex. 1, at 1.) Mr. Gibbs, Mr. Baker, and Mr. Woods all referred to threatened shift changes that they believed were retaliatory. (Tr. Vol. I, at 170-71, 199-200, 202, 214-15, 259.)

48. Several current and former employees of the Rabies Control Division, including Mr. Baker, Mr. Woods, and Mr. Acklin, testified that they witnessed harassment of Mr. Harrison. (Tr. Vol. I, at 200-01, 245-46, 259-60.)

49. Upon his appointment as Manager, Mr. Cole stated that he was "Bontrager's boy," and that whatever Mr. Bontrager said is "what goes." (Tr. Vol. I, at 35-36, 248.) Mr. Cole informed Mr. Harrison and other black employees that if they dug a ditch for him he would dig five for them "until he runs [their] asses away from there." (*Id.* at 35-36, 266-67.) In addition, Mr. Harrison and another employee, Jeffrey Baker, overheard Mr. Cole state to Billy Hendrixson, that the white folks were unable to get rid of Mr. Harrison, but he could get rid of Mr. Harrison because "it takes a nigger to get one, [and] I believe I can get him." (*Id.* at 37, 207-08.) Mr. Cole is black.

50. At several different meetings, Mr. Cole told employees that Metro could afford to pay $20,000.00, the same amount of money paid to Mr. Harrison upon his reinstatement, to get rid of someone. (Tr. Vol. I, at 37-38, 187, 206; Tr. Vol. III, at 51.) Mr. Cole stated in a meeting that Metro would pay off a lawsuit just to get rid of someone, no matter how long that individual had been employed, if Metro wanted to do so. (Tr. Vol. I, at 177.)

51. Mr. Harrison protested his supervisor's behavior toward him on many occasions. (Pl.'s Exs. 7, 20, 50.) On January 16, 1992, Mr. Harrison wrote a memorandum to Mr. Cole concerning alleged "harassment" by Mr. Cole, and sent a copy of the memorandum to the Director of the Health Department, Dr. Fredia Wadley. (Pl.'s Ex. 7; Tr. Vol. I, at 73-75.) Dr. Wadley testified that Mr. Harrison complained of harassment in meetings with her, and that he reported to her that Mr. Cole had referred to Mr. Harrison as a "nigger". (Tr. Vol. II, at 49.) On July 31, 1992, Mr. Harrison received a memorandum from Mr.

Bontrager on which Mr. Harrison wrote in response that he was being harassed for filing an EEOC charge. (Pl.'s Ex. 20.) Mr. Harrison wrote a letter on October 14, 1992, to the Mayor of Nashville concerning Metro's "campaign of harassment" against him. (Pl.'s Ex. 50.) Metro never took any action to address the concerns raised in Mr. Harrison's complaints. (Tr. Vol. I, at 75.)

52. Mr. Harrison and Mr. Baker, both of whom are black, reported seeing Mr. Hendrixson, who is white, display a Ku Klux Klan ["KKK"] hood and badge to Mr. Baker in February, 1992. (Tr. Vol. I, at 69-70, 203-05, 220.) At that time, Mr. Hendrixson was a Senior Officer, a position senior to that held by Mr. Baker. (Tr. Vol. I, at 204, 210.) Mr. Hendrixson acknowledged that he is a collector of Ku Klux Klan paraphernalia, and admitted that he used a knife with a Ku Klux Klan insignia. (*Id.* at 237-38.) Mr. Baker reported the incident in which Mr. Hendrixson displayed the Ku Klux Klan paraphernalia to his supervisor, Mr. Cole. (*Id.* at 204.)

53. Mr. Cole failed to take any action in response to Mr. Baker's complaint. (Tr. Vol. I, at 204; Tr. Vol. III, at 64.) Mr. Cole testified that he did not intend to take any action concerning the display of Ku Klux Klan materials to black employees under his supervision, and that he did not concern himself with "small things" like that. (Tr. Vol. III, at 64.)

54. Since May 17, 1982, Mr. Harrison has filed four charges with the EEOC alleging discrimination in his employment with the Health Department. (Stipulation, Doc. No. 32, at 1.)

55. On November 2, 1992, Dr. Wadley wrote a memorandum to Mr. Harrison in which she notified him that he was being discharged from employment. (Defs.' Ex. 6.) In her memorandum, Dr. Wadley noted that Mr. Harrison had not been reluctant to file "numerous" charges with the EEOC. (*Id.*; Tr. Vol. II, at 58.)

56. Despite the fact that Dr. Wadley wrote the memorandum discharging Mr. Harrison, Dr. Wadley sat with the Board of Health during hearings on Mr. Harrison's alleged misconduct and termination, and was named as a member of the Board of Health in transcripts of such hearings. (Tr. Vol. I, at 78; Tr. Vol. II, at 19, 22-23; Pl.'s Exs. 17, 18.) The Civil Service Rules provide that any person involved in investigating or prosecuting disciplinary infractions should not assist or advise the Board in its duties. (Pl.'s Ex. 1, at 45a-45b.)

57. Both Mr. Cole and Dr. Wadley testified that they were never informed about this Court's May 17, 1982, Order. (Tr. Vol. I, at 166-67, 169; Tr. Vol. II, at 19, 42.) Dr. Wadley stated that she first learned about the Order when she was in court to testify in this matter on March 31, 1994. (Tr. Vol. II, at 42.)

Damages

58. Mr. Harrison alleges that he suffered sleeplessness and emotional stress as a result of pressures at work. (Pl.'s Exs. 14, 15.) Upon consulting a physician, Dr. Gary McDonald, Mr. Harrison was diagnosed as having stress-related situational insomnia. (Pl.'s Ex. 15.) Dr. McDonald prescribed a sedative for Mr. Harrison, and noted that Mr. Harrison worked "under a great deal of stress with a

manager who is trying to run him off of a job." (Pl.'s Exs. 14, 15.)

59. At the time of his discharge on November 3, 1992, Mr. Harrison earned approximately $23,072.00 per year. (Pl.'s Ex. 13.) After his discharge, Mr. Harrison attempted to find other work. (Tr. Vol. I, at 81-83.) Mr. Harrison stated that he felt great shame in having to tell prospective employers that he had been fired from his last job. (*Id.* at 83.)

60. Mr. Harrison eventually found custodial work at Opryland in December, 1993. (Tr. Vol. I, at 112-13.) He then took a job handling biohazardous waste at night at Vanderbilt Hospital. (*Id.* at 84, 113.) In 1993, Mr. Harrison earned $411.40 at Opryland and $434.24 at Vanderbilt Hospital, for a total of $845.64 in earnings in 1993. (Pl.'s Ex. 9A.) Since January 1, 1994, Mr. Harrison has earned $5.70 per hour at Vanderbilt. (Tr. Vol. I, at 84.) Between January 1, 1994, and April 30, 1994, Mr. Harrison earned $3,921.60. Mr. Harrison asserts that his lost earnings between November 3, 1992, and April 30, 1994, are $30,068.76.

II. CONCLUSIONS OF LAW

A consent decree is simultaneously a voluntary settlement agreement and a final judicial order. *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2998 (1993). Accordingly, "a consent decree is aptly described as 'a settlement agreement subject to continued judicial policing.' " *Id.* (citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

Once a consent decree has been entered, its provisions operate as an injunction. *Williams*, 720 F.2d at 920. Moreover, a court will thereafter: "1) retain jurisdiction over the decree during the term of its existence; 2) protect the integrity of the decree with its contempt powers; and modify the decree should 'changed circumstances' subvert its intended purpose." *Id.* (citations omitted). Contempt proceedings are therefore an appropriate means by which a district court may assure compliance with a Consent Order.

In a proceeding for civil contempt, the plaintiff must prove by clear and convincing evidence that the defendant violated the court's prior order. *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991) (citing *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). A finding of civil contempt is within the discretion of the district court. *Peppers v. Barry*, 873 F.2d 967, 968 (6th Cir. 1989).

Willfulness is not an element of civil contempt. *TWM Mfg. Co., Inc. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983). Moreover, neither advice of counsel nor good faith conduct is a defense for failure to comply with a court order. *Peppers*, 873 F.2d at 968; *TWM Mfg.*, 722 F.2d at 1273 (citation omitted). Rather, the test for determining civil contempt is whether "the defendants took all reasonable steps within their power to comply with the court's order." *Glover*, 934 F.2d at 708 (quoting *Peppers*, 873 F.2d at 969).

In the present case, the central issue before the Court is thus whether defendant Metro took all reasonable steps within its power to comply with this Court's May 17, 1982, Agreed Order of Judgment. The May 17, 1982,

Order clearly directs Metro to pay Mr. Harrison $20,000.00 in back pay and attorney's fees; rehire Mr. Harrison at a Rabies Officer II position; train Mr. Harrison for promotion to a Rabies Officer III position; calculate job seniority and annual and sick leave as if Mr. Harrison had been continuously working; and refrain from discriminating against Mr. Harrison or other black employees on account of race, or in retaliation for Mr. Harrison's complaints against discrimination or this lawsuit.

It is undisputed that Metro paid Mr. Harrison $20,000.00 and rehired him as a Rabies Officer II. Beyond those measures, however, it is unclear whether Metro took any further steps to comply with the Court's May 17, 1982. Mr. Harrison never received training and was never promoted to a Rabies Officer III position. Notably, employees junior to Mr. Harrison served in the position of Rabies Control Officer III, and received higher salaries than Mr. Harrison.

Although training was offered to certain Rabies Control Division employees, relevant training was neither announced publicly nor posted on bulletin boards. Mr. Harrison was thus excluded from opportunities to improve his skills and gain training credentials. As well, even though this Court ordered that Mr. Harrison's seniority be restored and Mr. Harrison was thereafter the second most senior employee at the pound, Mr. Harrison was paid less than all other Senior Officers and was the only Senior Officer to be denied supervisory responsibilities.

During the Contempt Hearing, several current and former employees of the pound testified that they had witnessed harassment of Mr. Harrison, and that they feared retaliation for testifying. The Court accepts the testimony of various witnesses that Mr. Cole harassed Mr. Harrison, and was unresponsive to Mr. Harrison's complaints about harassment. The Court notes that Mr. Cole refused to take corrective action even after being advised that a white employee was displaying Ku Klux Klan paraphernalia at the pound.

Metro argues that it terminated Mr. Harrison for careless driving and paperwork errors. Although the Court is sympathetic to Metro's characterization of Mr. Harrison as an imperfect employee, the Court rejects Metro's rationale for firing Mr. Harrison as pretextual. The testimony revealed that several other employees received only a written reprimand for violations which were arguably more serious than those committed by Mr. Harrison. Such violations included those committed by an employee who was drinking on the job and failing to show up for work; a previous Manager of the pound who stole money; an employee who was involved in twelve (12) accidents in a Metro vehicle; and an employee who was in seven (7) accidents in a Metro vehicle over a six-year period. The Court notes that Mr. Harrison was punished for violating an accident reporting policy which either does not exist or, if it does, has not been applied uniformly to all employees.

The Court also questions the legitimacy of Metro's paperwork error audit. Mr. Harrison had received no training in completing receipts and had just begun working at the office during the period of the audit. Moreover,

the chart of fees was removed from the wall of the office when Mr. Harrison was working. As Mr. Cole demonstrated in his testimony, even an employee with more extensive experience working at the office would have difficulty calculating fees without the assistance of the chart. Finally, it appears that Metro arbitrarily selected which errors to tabulate in its audit, as none of the errors cited against Mr. Harrison were the type of errors listed by Mr. Bontrager in his July, 1992, memorandum to all employees.

The Court finds that Metro has failed to train or promote Mr. Harrison as directed, and has singled out Mr. Harrison for arbitrary and discriminatory treatment. In addition, Metro apparently failed to apprise both Mr. Harrison's supervisor, Mr. Cole, and the Director of the Health Department, Fredia Wadley, of the existence of this Court's May 17, 1982, Order. Such a lack of knowledge on the part of Mr. Cole and Ms. Wadley does not excuse Metro for Mr. Cole and Ms. Wadley's failure to comply with this Court's directives.

Accordingly, the Court concludes that Metro has failed to take all reasonable steps to comply with this Court's May 17, 1982, Order, and that Metro is therefore in contempt.

Where a complainant prevails in a civil contempt proceeding, judicial sanctions may be imposed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04, 67 S. Ct. 677, 701 (1947). *See also TWM Mfg.*, 722 F.2d at 1273 ("primary

purposes are to compel obedience to a court order and compensate for injuries caused by noncompliance"). A district may exercise its discretion in determining the amount of sanctions to be imposed, and such "'power does not evaporate when the cost of compliance is high." *Fortin v. Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 798 (1st Cir. 1982). *See also Redkin Lab., Inc. v. Levin*, 843 F.2d 226, 230 (6th Cir. 1988), *cert. denied*, 488 U.S. 852, 109 S. Ct. 137 (1988). In addition, contempt proceedings are compensable monitoring activities for which attorney's fees may be awarded. *Glover*, 934 F.2d at 716.

The Court finds that Mr. Harrison should be awarded damages to compensate him for injuries caused by Metro's noncompliance with this Court's May 17, 1982, Order including lost earnings, costs, and attorney's fees. Upon reviewing the file, however, the Court is unable to determine Mr. Harrison's lost earnings without further documentation. Accordingly, the Court requests that Mr. Harrison submit additional documentation with respect to his lost earnings, as well as his bill of costs and attorney's fees.

III. CONCLUSION

For the above-stated reasons, the Court hereby finds defendant Metropolitan Government of Nashville and Davidson County, Tennessee, in civil contempt of this Court's Order of Judgment entered on May 17, 1982. Accordingly, the Court orders defendant Metropolitan Government of Nashville and Davidson County, Tennessee, to do the following:

1. Reinstate plaintiff Robert Dale Harrison in the position of Senior Rabies Control Officer in the Rabies Control Division of the Health Department at a minimum salary of $23,072.00 per year, plus any salary increases to which he may be entitled;

2. Train plaintiff to perform efficiently in the position and for promotion to a higher pay step;

3. Provide Mr. Harrison with the type of supervisory opportunities usually awarded Senior Rabies Control Officers;

4. Calculate job seniority and annual and sick leave as if there had been no break in Mr. Harrison's employment;

5. Announce publicly all training and promotional opportunities relevant to Rabies Control personnel;

6. Refrain from discriminating against Mr. Harrison or other black persons on account of race, or in retaliation for Mr. Harrison's complaints against racial discrimination or this lawsuit;

7. Pay sanctions in an amount to be determined by the Court upon the submission of further documentation by Mr. Harrison; and

8. Communicate the contents of this Memorandum and accompanying Order to employees in a supervisory position to Mr. Harrison at the Health Department.

The Court orders plaintiff Robert Dale Harrison to submit further documentation regarding his lost earnings, as well as his bill of costs and attorney's fees, in accordance with this Memorandum. Furthermore, the

Court orders that plaintiff's lawsuit, styled *Robert Dale Harrison vs. Metropolitan Government of Nashville and Davidson County,* No. 3:93-1075, filed on December 30, 1993, be consolidated with this action.

An Order consistent with the findings herein is filed contemporaneously.

Entered this the 10th day of June, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT DALE HARRISON	]	
vs.	]	
	]	No. 80-3271
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body corporate and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, a body politic, and DR. JOE M. STRAYHORN, MRS. ELIZABETH L. JACOBS, DR. DOROTHY L. BROWN, MRS. GAIL PIGG, DR. HAROLD JORDAN, MRS. REBECCA CLARK CULPEPPER, who constitute all of the members of said BOARD OF HEALTH and JOSEPH M. BISTOWISH, M.D.	]	

ORDER

This matter was heard upon plaintiff's Petition to adjudicate defendant Metropolitan Government of Nashville and Davidson County, Tennessee, in civil contempt of this Court's Order of Judgment entered on May 17, 1982, in the above-styled case.

Consistent with the contemporaneously-filed Memorandum, the Court hereby finds defendant Metropolitan

Government of Nashville and Davidson County, Tennessee, in CIVIL CONTEMPT of this Court's Order of Judgment entered on May 17, 1982. Accordingly, the Court ORDERS defendant Metropolitan Government of Nashville and Davidson County, Tennessee, to do the following:

1. Reinstate plaintiff Robert Dale Harrison in the position of Senior Rabies Control Officer in the Rabies Control Division of the Health Department at a minimum salary of $23,072.00 per year, plus any salary increases to which he may be entitled;

2. Train plaintiff to perform efficiently in the position and for promotion to a higher pay step;

3. Provide Mr. Harrison with the type of supervisory opportunities usually awarded Senior Rabies Control Officers;

4. Calculate job seniority and annual and sick leave as if there had been no break in Mr. Harrison's employment;

5. Announce publicly all training and promotional opportunities relevant to Rabies Control personnel;

6. Refrain from discriminating against Mr. Harrison or other black persons on account of race, or in retaliation for Mr. Harrison's complaints against racial discrimination or this lawsuit;

7. Pay sanctions in an amount to be determined by the Court upon the submission of further documentation by Mr. Harrison; and

8. Communicate the contents of this Memorandum and accompanying Order to employees in a supervisory position to Mr. Harrison at the Health Department.

The Court ORDERS plaintiff Robert Dale Harrison to submit further documentation regarding his lost earnings, as well as his bill of costs and attorney's fees, in accordance with the contemporaneously-filed Memorandum. Furthermore, the Court ORDERS that plaintiff's lawsuit, styled *Robert Dale Harrison vs. Metropolitan Government of Nashville and Davidson County*, No. 3:93-1075, filed on December 30, 1993, be CONSOLIDATED with this action.

Entered this the 10th day of June, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT DALE HARRISON, Plaintiff VS. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ETC., ET AL., Defendants	)	CIVIL ACTION NO. 80-3271 JUDGE NIXON

ORDER OF JUDGMENT

Upon agreement of the parties hereto, this case is hereby dismissed upon compliance with the following, which is hereby ORDERED, ADJUDGED AND DECREED:

1. The defendant Board of Health of the Metropolitan Government of Nashville and Davidson County shall rehire the plaintiff at the position of Rabies Control Officer II in the Rabies Control Division of the Metropolitan Department of Health at a minimum salary of $1,057.00 per month, plus any pay increments or raises to which he may be entitled. The rehire shall be effective June 1, 1982.

2. The plaintiff shall receive any on-the-job training necessary to perform efficiently in the position and for promotion to the position of Rabies Control Officer III

upon such position becoming available and plaintiff meeting the qualifications therefor.

3. Job seniority will be calculated as if the plaintiff has been on the job with no break in service.

4. The plaintiff will receive back pay in the amount of $15,000.00 with necessary deductions for Federal Income Tax and FICA contribution.

5. Annual leave and sick days will be calculated as if there had been no break in plaintiff's employment at the Metropolitan Health Department and will be a minimum of 18 days of annual leave and sick days.

6. Attorney's fees of $5,000.00 will be paid to plaintiff's attorney over and above the back pay above ordered, the attorney's fee having been determined to be a reasonable fee for services.

7. The defendants shall not discriminate against plaintiff or other black persons on account of race, or on account of his complaints against racial discrimination or this lawsuit.

8. The parties to this action are hereby mutually released of any further liability to each other, or their privies, arising out of this action; and any and all charges against the defendants either individually or in their professional capacities are dismissed upon defendants' compliance with this Order of Judgment.

9. The defendant, the Metropolitan Government, shall pay all costs resulting from this action.

Enter this 17 day of May 1982.

/s/ John T. Nixon
U.S. DISTRICT JUDGE

ENTER AS A CONSENT ORDER:

WILLIAMS AND DINKINS

By /s/ Avon N. Williams, Jr.
Avon N. Williams, Jr.

Attorneys for Plaintiff

/s/ Robert Dale Harrison
Robert Dale Harrison

Plaintiff

/s/ John Kennedy, Jr.
JOHN KENNEDY, JR.

Attorney for Defendants

CERTIFICATE

The undersigned hereby certifies that copy of the foregoing Order Of Judgment was mailed to William Howard, Esquire and John Kennedy, Jr., Esquire, Metropolitan Attorneys, Metropolitan Courthouse, Nashville, Tennessee 37201, this the 14th day of May, 1982.

/s/ Illegible

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

(2)

No. 96-36

In The

Supreme Court of the United States

October Term, 1995

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

ROBERT DALE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT ROBERT DALE HARRISON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SUSAN S. GARNER
(Counsel of Record)
ROBERT J. TURNER
TURNER LAW OFFICES, P.C.
Third Floor
208 Third Avenue North
Nashville, Tennessee 37201
615/259-2660

Attorneys for Respondent Robert Dale Harrison

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit construed a consent decree in a federal civil rights case in a way which violates the Fifth Amendment to the United States Constitution or applicable decisions of the United States Supreme Court by effectively modifying the terms of the decree, and holding Petitioner in contempt thereof.[1]

---

[1] Respondent notes that although Petitioner fails to include its Constitutional claim in its statement of the questions presented for review, Petitioner does in fact raise and argue the Constitutional claim in its Petition, and this issue should therefore properly be included in the questions presented for review.

TABLE OF CONTENTS

Page

Question Presented for Review..... i

Table of Citations..... iii

Statement of The Case..... 1

Reasons Why the Petition Should Be Denied..... 11

Conclusion..... 14

TABLE OF CITATIONS

Page

CASES CITED:

Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955) 14

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S. Ct. 748, 116 L.Ed. 2d 867 (1992)..... 13

United States v. Shubert, 348 U.S. 222, 75 S. Ct. 277, 99 L.Ed. 279 (1955) 13

CONSTITUTIONAL PROVISIONS:

Article III, Section 2 of the United States Constitution 12

Fifth Amendment to the United States Constitution..... i, 12

COURT RULES:

Supreme Court Rule 10 13

Supreme Court Rule 15 1

BRIEF OF RESPONDENT ROBERT DALE HARRISON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Robert Dale Harrison ("Respondent") respectfully requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit submitted by the Petitioner Metropolitan Government of Nashville and Davidson County ("Metro").

STATEMENT OF THE CASE

Pursuant to Rule 15 of the Supreme Court Rules, Respondent submits this statement of the case to correct misstatements and omissions of material fact in the Petition which would be relevant to issues before the Court if certiorari were granted.

A. Metro's Harassment of and Retaliation Against Harrison

Respondent Harrison, who was 53 years old at the time of the District Court's 1994 hearing on the Petition for Contempt, is a Black or African American man who was originally hired by Metro to work in its Health Department in 1972. He originally filed suit for relief from race discrimination in 1980, complaining of Metro's failure to promote him while less qualified white employees were promoted, Metro's harassment and intimidation of him after he filed a Charge of Discrimination with the EEOC, and Metro's failure to provide him with training and equal employment opportunities.

After the District Court's entry of the Order of Judgment on May 17, 1982 with the consent of the parties (Appendix to the Petition at 68a), Harrison was returned to work. Immediately upon his return to employment, Harrison was subjected to hostility and excessive scrutiny of his work by Metro. A junior White employee, Kenneth Chambers, was assigned to ride with Harrison and watch him closely for anything Harrison might do incorrectly. A coworker testified that Harrison was watched to see if he "dotted his i's and crossed his t's".

Thereafter, Larry Cole became Harrison's supervisor. Witnesses testified that Cole exhibited a dominant, hostile attitude toward the Black employees under his supervision, even though Cole was himself Black. Cole referred to the Black employees as "niggers". He made threatening statements to Harrison and other black employees, including the statement that he would "run their assess away from there." Harrison and another employee witnessed Cole state to Billy Hendrixson, a white employee, that the White folks hadn't been able to get rid of Harrison, but that "it takes a nigger to get a nigger", and he believed he could get Harrison. In several different meetings, Cole told employees that Metro could afford to pay $20,000 to get rid of someone, in reference to the damages Metro had been required to pay Harrison at the time of his reinstatement. Cole ridiculed Harrison in front of his co-workers and criticized him unjustly.

Upon learning that Billy Hendrixson, who is White, displayed a Ku Klux Klan hood and badge to Harrison and Jeffrey Baker, another Black employee, Cole only laughed. Hendrixson admitted at the contempt hearing that he possessed Ku Klux Klan paraphernalia and that

he used a knife with Ku Klux Klan insignia openly at work. Cole testified at the contempt hearing that he did not take any action concerning the display of this and other Ku Klux Klan paraphernalia in the workplace, because he did not concern himself with "small things" like that. Both Harrison and Baker testified that they were shocked and upset by the sight of the Ku Klux Klan materials, and Harrison testified that it caused him stress.

Harrison and other Black employees protested Cole's harassing behavior to managers of the Health Department on many occasions, and even reported it in writing to the Mayor, but Metro took no action to halt the harassment. Although Fredia Wadley, M.D., the Director of the Health Department, admitted that Harrison reported to her that Cole referred to him as a nigger, no action was taken to provide Harrison with relief. Indeed, it was necessary for Harrison to file four EEOC Charges between 1982 and 1992 in an effort to obtain relief from Metro's retaliation and harassment.

B. Metro Failed to Train Robert Harrison and Other Black Employees as Ordered by the District Court

Between the entry of the Order of Judgment in 1982 and his discharge by the Health Department in November of 1992, Harrison was neither provided nor offered any training, except for a single euthanasia training from which he was excused for moral reasons. The written training record maintained by Metro establishes unequivocally that Harrison received no training after 1974. The training record of Black employee Robert Gibbs shows a

similar lack of training. In contrast, White employees who were junior to Harrison and Gibbs, including Billy Hendrixson, Victoria Maxwell and Kenneth Chambers, did receive training, including training as supervisors and animal control training, and were sent out of town to receive training and certificates.

Notice of training opportunities was not posted or provided to Harrison, and he learned of particular training programs only after the fact when White employees such as Hendrixson and Chambers talked about them afterward.

C. Metro Failed to Promote Harrison and Other Black Employees

Upon his reinstatement to work in 1982, Harrison learned that two junior White employees, Chambers and Ronald Cartwright, had already been promoted to Rabies Control Officer III positions. Prior to his reinstatement, Harrison's attorney had requested that he be given a Rabies Control Officer III position, but was told that no III position was available. However, Metro testified at the contempt hearing that it created a Rabies Control Officer II position for Harrison at his reinstatement. Harrison was never promoted to Rabies Control Officer III, despite the specific Order of the District Court that he be restored to all seniority and that he be trained for promotion to Rabies Control Officer III.

Metro's Civil Service Rules and Regulations require that job vacancies that will provide promotional opportunities be announced and advertised. However, promotional opportunities were neither posted nor made

known to Harrison and other Black employees between 1982 and the contempt hearing; rather, information concerning promotional opportunities was given by word of mouth only to those whom the Health Department wanted to know about the openings. Nevertheless, Harrison applied for positions superior to his on many occasions between 1982 and 1992, in case the positions were available but unknown to him. In 1984 and again in 1988, Harrison applied for the position of Rabies Control Officer III. In 1988, he applied for the open position of Rabies Control Manager. Metro conceded that Harrison was qualified for the position of Rabies Control Manager, and he scored well on the test for the position. Nevertheless, he was denied all of these positions. Other Black employees testified concerning numerous instances in which they had been denied promotional opportunities in favor of junior and less qualified White employees. In some cases, Black employees were denied promotional positions which were awarded to White individuals not previously employed by Metro, who had no experience whatsoever, in violation of the Civil Service Rule that promotions be made from within the Department whenever possible.

Cole admitted that he assigned supervisory responsibilities to every Senior Rabies Control Officer except Robert Harrison. Metro further assigned less desirable and more onerous job duties to Harrison and other Black employees than to junior White employees in the same job classification. Office work was primarily awarded to White employees, while Black employees were required to chase after dogs, pull dogs out from under houses,

bury dead and decomposed animals, and cut the heads off dogs so that they could be examined for rabies.

Neither Harrison nor Gibbs, the two most senior officers at the pound, were given offices at the pound during the period when they were allowed to work inside. Hendrixson and Chambers, both of whom are White and have less seniority than Harrison and Gibbs, had private offices at the pound.

D. Metro Provided Disparate and Less Favorable Pay and Benefits to Harrison and Other Black Employees

At the time of his discharge in 1992, Harrison was paid less than Hendrixson, Chambers, and Cartwright, all of whom were White and junior to Harrison in seniority. **All of the Senior Rabies Control officers were paid more than Harrison.**

Black employees testified to a disparity in the way sick leave was allowed to Black and White employees.

E. Harrison was Subjected to Disparate Adverse Disciplinary Treatment, and the Stated Reasons for his Discharge Were Pretextual

1. Harrison was Disciplined More Harshly than White Employees

Harrison received a number of spurious and unjust disciplinary charges between 1982 and 1992. White employees who engaged in the same or similar acts for

which Harrison was disciplined were either not disciplined at all or were disciplined less severely.

The Civil Service Rules and Regulations specify that progressive discipline, consisting of a written reprimand, suspension, demotion and dismissal in that order, be imposed for infractions of rules. However, in practice White employees were often just counseled privately by Cole, while Black employees were suspended.

In August of 1991, Harrison was suspended for six days for allegedly encouraging another employee, Jeffrey Baker, to leave his territory, and for picking up cats. Harrison had no supervisory authority over Baker and could not control Baker's actions. Baker had been disciplined for leaving his territory on an earlier occasion, but he was given a suspension, the same penalty imposed upon Harrison, who had never before been accused of the offense. Moreover, the proof showed that other employees who had repeatedly been out of their territory and had falsified records of their whereabouts were given only written reprimands for these offenses. Further, while Metro contended that Rabies Control Officers were not permitted to pick up cats, Harrison's written job description expressly stated that one of his duties was to pick up cats.

White employees who engaged in disciplinary infractions far more serious and repeated than any Harrison was accused of received more lenient discipline. Troy Kelly, a White employee of the pound, repeatedly came to work intoxicated with the knowledge of his supervisors, drove Metro vehicles while his driver's license was suspended due to DUI convictions, failed to show up for

work, failed to respond when called on the radio, used abusive language and threatened the public at Metro meetings, disrupted official meetings, failed to notify his supervisor of an accident which occurred while he drove a Metro vehicle, and had four accidents while on duty. He never received more than a written reprimand for any of these offenses.

Another White employee, Troy Kelly, had 12 motor vehicle accidents, some of which required Metro to pay for property damage, written reprimands for driving 85 miles per hour in a 55 mile per hour zone, for using profanity in a meeting, and both oral and written reprimands for repeatedly taking dogs home from the pound in violation of rules. Despite these numerous serious offenses, Rhodes never received anything more than a written reprimand.

Another White Health Department employee, Ed Watkins, was given only a written reprimand after his seventh accident in a Metro vehicle in six years. Willy Swafford, a White former pound employee, was found to have stolen significant amounts of money from the pound, but was not discharged. Instead he was allowed to resign with full retirement benefits.

2. The Reasons for Harrison's Discharge Were Pretextual

Metro put forth four purported justifications for discharging Harrison in November 1992. All of them are pretextual.

One of Metro's stated reasons for discharging Harrison was that he had had four motor vehicle accidents since 1988. Harrison had only five minor accidents in his twenty-year tenure with the Rabies Control Division, despite the fact that he spent ninety percent of his working hours on the road looking for dogs. Other similarly situated White employees had more accidents than Harrison, but were not discharged.

Metro's purported justification for discharging Harrison and not the White employees who had more accidents was that Cole had instituted a "clean slate" policy when he became Manager of the pound in 1988, and that only Harrison had four accidents after 1988. There is no authority for such a "clean slate" policy in the Civil Service Rules and Regulations, however, and in fact such a policy contravenes the progressive discipline policy contained in the Civil Service Rules. Moreover, Cole did not apply his "clean slate" policy uniformly. In a written memorandum in 1991, Cole admonished Rhodes for having seven accidents since 1984, citing accidents which had occurred before 1988 and the institution of the "clean slate" policy. Metro also attempted to justify Harrison's firing on the ground that other employees who had more accidents were not at fault in all of their accidents; the evidence showed that Harrison was not at fault in all of his accidents.

Metro's second purported reason for firing Harrison was that he allegedly failed to report an accident which occurred in 1992. However, Harrison immediately tried to call Cole when the accident occurred, and Cole being unavailable, left a message reporting the accident. Harrison later reported the accident to Cole in person on the

same day. Metro had no policy indicating how or when accidents were to be reported to one's supervisor.

Notably, White employees who failed to report accidents were not discharged or even disciplined significantly. Rhodes had several accidents which he did not report, but he was not disciplined at all. Troy Kelly had an accident which he did not report to either the police or his supervisor, and which he initially attempted to blame on Jeffrey Baker. When he finally admitted the accident, Kelly received only a written reprimand, rather than a discharge as Harrison did, for having failed to report the accident.

A third reason proferred by Metro for Harrison's discharge was that he allegedly failed to complete paperwork correctly. However, other employees made paperwork errors and were not discharged or disciplined in any way. Evidence of record indicates that all employees of the pound, including Manager Larry Cole, had numerous paperwork errors, and that in fact White employees Chambers and Hendrixson had far more errors than Harrison in the same time period. Harrison had significantly less experience than the comparable employees in working in the office, and had received no training in how to complete the required paperwork. When Robert Gibbs offered to train Harrison in how to complete the paperwork, Cole denied his request, and Cole also removed the chart of fees to be charged in the completion of forms from the office and hid it from Harrison. Cole himself could not properly calculate the fees without the chart at the hearing in this case. Although Harrison was accused of "blacking out" information on receipts, he did not do so, and the initials of

other employees appear on some of the receipts Harrison was accused of blacking out.

A fourth reason proferred by Metro for Harrison's discharge was that he was allegedly rude to the public. Harrison had never before been accused of being rude in his twenty year history with Metro, and in fact in January of 1992 had been rated "above standard" for his relationship with the public in his performance evaluation. An eye witness testified that Harrison had been polite during the incident in question, and had addressed the customer as "sir". Indeed, the Metro Board of Health determined after a hearing that Harrison had not been rude to the public.

Respondent notes that Metro refers in its Petition to a pre-1992 discharge of Harrison for allegedly falsifying doctor's appointment slips. Although no evidence was introduced by Metro at the contempt hearing to support this accusation, Harrison denied having falsified any document, and his discharge on this ground was overturned by the Metro Board of Health.

REASONS WHY THE PETITION SHOULD BE DENIED

A. This Court has no Jurisdiction to Hear the Constitutional Claim raised by Petitioner for the First Time in This Court

Petitioner Metro seeks to have this Court grant a writ of certiorari to adjudicate a Constitutional claim which Metro raises for the first time in this Court. Specifically, Metro argues that the District Court and the Court of

Appeals applied the 1982 Order of Judgment in such a way as to violate Metro's right to due process under the Fifth Amendment to the United States Constitution. However, Metro failed to raise this issue before the Sixth Circuit either in its appeal or in a Petition for Rehearing. No Constitutional claim has been briefed or argued at any time by Metro below, nor did the Sixth Circuit Court of Appeals consider or decide a Constitutional claim.

The United States Supreme Court is not a Court of original jurisdiction, except in cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." Article III, Section 2 of the United States Constitution. In all other cases, the Supreme Court has appellate jurisdiction, under such laws as the Congress shall make. Article III, Section 2 of the United States Constitution. Therefore, Respondent respectfully submits that this Court is without jurisdiction to entertain Petitioner's newly-raised Constitutional claims, and the Petition for Certiorari should accordingly be denied.

B. Petitioner's Argument that the Courts Below Erred in Interpreting or Applying the Order of Judgment Raises No Important Question Justifying Review by the Supreme Court.

Metro argues, in essence, that the District Court and the Sixth Circuit Court of Appeals made factual or legal errors by "rewriting" the Order of Judgment.[2] Even if this

---

[2] Respondent disputes that the Courts did so, and submits that the decisions of both the District Court and the Court of

were true, such errors do not bring this case within the parameters for the exercise of Supreme Court jurisdiction contemplated by Rule 10 of the Rules of this Court.

As Metro concedes at Page 10 of its Petition, "established procedure [sic] and criteria exist for reviewing consent decrees and modifying them in light of changed circumstances. *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992)". Metro then argues that the Courts below did not follow those established criteria. This argument, even if valid, presents no special and important reasons supporting the issuance of a writ of certiorari by this Court. *See* Supreme Court Rule 10. Metro's Petition does not present a significant or important legal question, but rather concerns the application of established law to the evidence of record in this case. Metro's argument is merely a thinly-disguised attempt to have this Court second-guess the findings of the Courts below, and as such does not merit the grant of a writ of certiorari. *United States v. Shubert,* 348 U.S. 222, 229, n. 1, 75 S. Ct. 277, 99 L.Ed. 279 (1955). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[3] Supreme Court Rule 10.

Appeals were fully supported by the evidence of record and by the law.

[3] Notably, Metro omits this portion of the Rule when it quotes Supreme Court Rule 10 in its Petition for Certiorari.

C. Decision of the Issue Raised by Metro Would be of Little Public Importance or Precedential Value.

Because Metro's contention is in reality that the Courts below made erroneous factual findings or misapplied established law, any decision which this Court might render would have little precedential effect or practical value. Consideration of this issue would serve an important purpose only for the parties to this litigation. Accordingly, this case does not warrant the expenditure of this Court's limited time and resources. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955).

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SUSAN S. GARNER
(Counsel of Record)
ROBERT J. TURNER
TURNER LAW OFFICES, P.C.
Third Floor
208 Third Avenue North
Nashville, Tennessee 37201
615/259-2660

Attorneys for Respondent
Robert Dale Harrison

Supreme Court, U.S.
FILED
AUG 29 1996
CLERK

(3)

No. 96-36

In The

Supreme Court of the United States

October Term, 1995

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and BOARD OF HEALTH OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioners,

vs.

ROBERT DALE HARRISON,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

James L. Murphy III
Stephen Nunn
Counsel of Record
John L. Kennedy

Metropolitan Department of Law
Attorneys for Petitioners

204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/862-6341

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

The most striking feature of Respondent's Brief in Opposition to the Metropolitan Government's Petition for Certiorari is that Respondent nowhere disputes the Metropolitan Government's position that the courts below went beyond the parameters of the 1982 Consent Decree. While not dispositive, surely this implicit admission is entitled to some weight in the decision whether to grant certiorari.

A. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent dwells at length on the allegations that Mr. Larry Cole used the epithet "nigger" in referring to the Respondent. (It should be noted that Mr. Cole himself is black.) Respondent also emphasizes allegations that a white employee brought Ku Klux Klan paraphernalia to the workplace. There was evidence that these things occurred; and it is undisputed that on at least one occasion an item of Ku Klux Klan paraphernalia was brought to the workplace. The Metropolitan Government has always stated that any such conduct was reprehensible in the extreme. However, such incidents were at most, even accepting all of Respondent's allegations as true, isolated incidents which did not rise to the standard necessary to show racial harassment. *Davis v. Monsanto Chemical Company*, 858 F.2d 345 (6th Cir. 1988); *Nazaire v. T.W.A.*, 807 F.2d 1372 (7th Cir. 1986); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985). The Sixth Circuit agreed with this, and reversed the District Court's finding of harassment as being clearly erroneous. *Harrison v. Metropolitan*

Government, 80 F.3d 1107 at 1117-18 (6th Cir. 1996). Respondent has not appealed from this finding and therefore should not be permitted to rely upon these inflammatory factual allegations.

At page 5 of his brief, Respondent complains of an alleged failure to assign supervisory responsibilities to him. This is another example of the Respondent's desire to go beyond the scope of the Consent Decree, which nowhere requires the Metropolitan Government Government to assign him supervisory responsibilities. Nowhere in the record is there any proof that supervisory duties are a necessary component of accrual of seniority of promotional opportunity. The District Court in effect created a right to be assigned supervisory duties out of thin air without benefit of proof. A district court cannot simply add provisions to a consent decree to satisfy the purposes of one of the parties. *Firefighters v. Stotts*, 467 U.S. 561 at 574 (1984).

The Respondent's brief implies, at page 6, that he was always paid less than all of the Senior Rabies Control Officers; but this is not the case. For several years he was paid the same as Mr. Hendrixson, who is white, but in the last two months of his tenure received less due to a prior poor performance evaluation.

At page 8 of his brief – repeating an error made before the Sixth Circuit – Respondent claims that Mr. Ed Watkins was white. Mr. Watkins is black, a fact established at Vol. II, page 205 of the transcript of the record.

The Metropolitan Government notes that most of the allegedly "pretextual" reasons for discharging Harrison complained of at pages 8-11 of the brief were not, in fact,

relied upon by the Metropolitan Government for purposes of this Petition and are therefore not relevant here.

B. REPLY TO RESPONDENT'S REASONS WHY THE PETITION SHOULD BE DENIED.

Respondent apparently contends that this Petitioner has waived the right to raise the question of due process of law in this Petition for Certiorari, contending that that issue was not addressed by the District Court or the Court of Appeals.

With respect to the District Court, the issue of whether the Court had gone beyond the scope of the Consent Decree could not by definition arise until after the Court ruled. It could not previously have been presented to the District Court in those terms. With respect to the Court of Appeals, the issue was in fact raised. Review of the Petitioner's principal brief discloses that the Metropolitan Government did, at pages 15-16, raise the issue of the District Court going beyond the scope of the 1982 decree. Moreover, the Metropolitan Government's Reply Brief, at page 7, specifically alleges that the Metropolitan Government was "deprived of any notice and opportunity to present proof" because of the way the District Court misconstrued the Consent Decree with respect to the issue of promotion. While the exact words "due process" may not be articulated in the briefs, the substantive issue – the Court's effectively rewriting the Consent Decree – was both briefed and argued.

As noted in the Petition for Certiorari, moreover, an important federal question is at issue in this Petition, even if the Metropolitan Government, being a political

subdivision of a state, is deemed unable to assert due process; or if Respondent's position that the issue is waived is accepted for purposes of argument. As stated in the Metropolitan Government's Petition, at page 12, contract rights and the federal common law applicable to consent decrees created by the decisions of this Court are at issue independent of the concept of due process per se. Consent decrees are said to be especially important and valuable for resolution of Title VII litigation. *International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 at 517-24 (1986). This Government will be disinclined to resolve Title VII lawsuits (and perhaps other federal litigation) by entry of a consent decree if the rulings of the courts below in this case stand. Whether other litigants will be similarly disinclined to rely upon consent decrees is of course a matter of speculation. But to the extent that viability of consent decrees, especially in the context of Title VII, is considered an important federal question, this case certainly seems to meet that criterion.

Finally, Petitioner would again note that Respondent nowhere in his brief denies or disputes that the District Court, and the Court of Appeals to the extent that it affirmed the District Court, traveled beyond the bounds of the 1982 Consent Decree. While not entirely dispositive, surely this implicit acknowledgment that the terms of the Consent Decree were not respected should be

given some weight in the decision whether to grant the Petition for Certiorari.

Respectfully submitted,

STEPHEN NUNN
Counsel of Record
JAMES L. MURPHY III
JOHN L. KENNEDY
Metropolitan Department of Law
Attorneys for Petitioners
204 Metropolitan Courthouse
Nashville, Tennessee 37201
615/582-6341